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In The Supreme Court
Of The United States

October Term, 1973

No. A-1126

THE SECRETARY OF SOCIAL AND REHABILITATION SERVICES OF KANSAS,
Petitioner,
v.
SENECA NURSING HOME,
et al, Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioner Secretary of Social and Rehabilitation Services of Kansas respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered on February 27, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The opinion of the District Court for the District of Kansas, consisting of Findings of Fact and Conclusions of Law filed on August 4, 1971, and a Declaratory Judgment

filed on August 10, 1971, is unreported and appears in the Appendix hereto.

JURISDICTION

Seneca Nursing Home, Woodlawn Nursing Home, Inc., Kenwood View Nursing Home, Halstead Nursing Center, Inc., Northeast Nursing Center, Inc., North Central Nursing Center, Topeka Convalescent Center, Eventide Convalescent Center, Inc., Ivy Manor Nursing Home, Inc., Stafford Homes, Green Meadows Nursing Center, Inc., Terrace Gardens Skilled Nursing Center, Cedar House, Inc., Fountain Villa, Dodge City Manor, Briar Hill Manor, Valley View Home, Leisure Center, Tanner Care Home, Brookside Manor, Inc., Hartford Manors, Inc., Indian Creek Nursing Center, Inc., Great Bend Manor, Inc., Lakeside Rest Home, Anna's Care Home, Kare Free Heights, Duggins Personal Care Home, Martin Care Home, Bluffview Home, Guy's Care Home, Conner Home, Chambers Care Home, Hamlin Home for Aged Ladies, and Joplin Home, are the plaintiffs and appellees in this matter. The Kansas State Board of Social Welfare, Robert C. Harder, State Director of Social Welfare, William C. Graham, Chairman of the State Board of Social Welfare, Richard S. McAnany, Member and Vice-chairman of the State Board of Social Welfare; and Merrell V. Welch, Member of the State Board of Social Welfare; and Elliot L. Richardson, Secretary of the United States Department of Health, Education and Welfare, are the defendants. The Kansas State Board of Social Welfare has by Executive Reorganization Order Number I of the State of

Kansas been abolished and has been replaced in its powers and duties by the Secretary of Social and Rehabilitation Services, which office is now held by Dr. Robert C. Harder. The Secretary of the United States Department of Health, Education and Welfare did not join in the appeal to the United States Court of Appeals and does not join in this petition.

The judgment of the Court of Appeals for the Tenth Circuit was first entered on January 18, 1974. A timely petition for rehearing was denied on February 11, 1974. An order to modify the opinion was filed on February 27, 1974, and an application for an extension of time was presented to Mr. Justice White within 90 days of that date. Mr. Justice White granted an order extending the time to file this appeal until June 27, 1974, and this petition for certiorari was filed within that extended time. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a federal appellate court may properly assume pendent jurisdiction to make the factual finding of an express contractual relationship between nursing home providers and a state agency based upon a state medical assistance plan, the state statutory measure of payments, and the licensure requirements of a separate state agency when the trial court had found an implied contract?

2. Whether a contractual relationship, if existent, between nursing home providers and a state agency can be expressly found or implied from a state medi-

cal assistance plan, the state statutory measure of payments, and the licensure requirements of a separate state agency without also including the state constitutional and statutory appropriation provisions and the state statutory immunity provisions in the determination of the form of the contract?

3. Whether nursing home providers have any interest, other than an ordinary public interest, or standing to assert the claims of indigent welfare recipients which they may provide care for?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment 11:

> *Suits Against States.* The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by Citizens or Subjects of any Foreign State.

United States Code, Title 28:

> §1254. *Courts of appeals; certiorari; appeal; certified questions*
>
> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

§1331. *Federal question; amount in controversy; costs*

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

§1441. *Actions removable generally*

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or

residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

§2201. *Creation of remedy*

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

§2202. *Further relief*

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

Constitution of the State of Kansas, Article 2, Section 24:

Appropriations. No money shall be drawn from

the treasury, except in pursuance of a specific appropriation made by law, and no appropriation shall be for a longer term than two years.

Kansas Statutes Annotated (K.S.A.) (1970 Supp.), Chapter 39, Article 7:

§708(a) The state board of social welfare shall have the power and it shall be its duty to develop state plans, as provided for under the federal social security act, whereby the state cooperates with the federal government in its program of assisting the states financially in furnishing public assistance to the needy aged, the needy blind, and dependent children, and in furnishing child welfare services and other social welfare services within the state. The state board of social welfare shall undertake to cooperate with the federal government on any other federal program providing federal financial assistance in the field of social welfare not inconsistent with this act. The state board of social welfare shall also have the power and it shall be its duty to develop a state plan in regard to assistance in which federal government does not participate.

§708(k) All contracts shall be made in the name of 'the state board of social welfare of Kansas', and in such name the state board may sue and be sued on such contracts.

§708(s) The state board shall develop plans financed by federal, state and county funds for providing medical care for needy persons. The state board of social welfare in developing any such plan, may enter into an agreement with an

agent or intermediary, for the purpose of performing certain functions, including the making of medical payment reviews, determining the amount due the medical vendors from the state, in accordance with standards set by the state board, preparing and certifying to the state board, lists of medical vendors and the amounts due them, and other related functions as may be determined by the board. The state board, in developing such plans, may establish a fund to be maintained and operated as a prepayment arrangement into which fixed payments are made each month in behalf of each public assistance recipient covered by the fund to meet the cost of medical services for public assistance recipients paid from the fund to suppliers of medical services. If established, such fund may not be used for any purpose other than for which it was created and must be dedicated to the payment of costs of medical services for recipients for whom payments are made to the fund: *Provided*, Upon payment being made from such fund for the cost of medical care as provided for herein, the record of such payment shall be submitted to the county social welfare board of the county in which the recipient of such medical care resides. The state board may also provide such medical, remedial, preventive or rehabilitative care and services by the payment of premiums to the federal social security system for the purchase of such supplemental medical insurance benefits as may be provided by the federal social security act and amendments thereto.

§708(x) The state board shall take such action

as may be necessary to assure that persons, firms and corporations selling property or providing services and licensed practitioners, within the scope of their practice as defined by state law who provide professional services under the provisions of the federal social security act, shall be paid reasonable charges. Payment for other medical assistance under the provisions of the federal social security act shall be reasonable charges: *Provided, however,* That if such payments are otherwise limited by federal law, such payments shall be as near the reasonable charges as may be permitted by federal law.

Kansas Statutes Annotated, Chapter 46, Article 9:

§901 Governmental immunity of state; implied contract, negligence or other tort; notice in state contracts. (a) It is hereby declared and provided that the following shall be immune from liability and suit on an implied contract, or for negligence or any other tort, except as is otherwise specifically provided by statute:

(1) The state of Kansas; and

(2) boards, commissions, departments, agencies, bureaus and institutions of the state of Kansas; and

(3) all committees, assemblies, groups, by whatever designation, authorized by constitution or statute to act on behalf of or for the state of Kansas.

(b) The immunities established by this section shall apply to all the members of the classes described, whether the same are in existence on

the effective date of this act or become members of any such class after the effective date of this act.

(c) The state of Kansas and all boards, commissions, departments, agencies, bureaus and institutions and all committees, assemblies and groups declared to be immune from liability and suit under the provisions of subsection (a) of this section shall, in all express contracts, written or oral, with members of the public, give notice of such immunity from liability and suit.

STATEMENT OF THE CASE

This case involves a dispute between a group of licensed nursing homes in Kansas and the former State Board of Social Welfare of Kansas over payment for services provided by the nursing homes to welfare recipients under state and federal welfare programs. In July, 1970, the nursing homes as plaintiffs, alleging the existence of a class, filed suit in the District Court of Shawnee County, Kansas, seeking a declaratory judgment, a permanent injunction and damages. No federal defendants were named. The state defendants removed the action to the United States District Court for the District of Kansas claiming that federal questions were presented because the petition attacked a program grounded upon Title XIX of the Social Security Act and the regulations thereunder which emanated from the Department of Health, Education and Welfare. After initial discovery, plaintiffs filed an amended and supplemental complaint and thereafter the Secretary of Health,

Education and Welfare was brought in as an additional party defendant.

The United States District Court found jurisdiction under 28 U.S.C. 1441 and 1331 in that claims and rights arose under the Federal Social Security Act, and the jurisdictional amount existed and that the relief sought was proper under 28 U.S.C. 2201 and 2202. The United States District Court allowed the case to be maintained as a class action and after trial made 76 findings of fact and 22 conclusions of law and entered a declaratory judgment on the plaintiffs' first three causes of action. The other, fourth cause of action for supplemental relief was by stipulation reserved for trial in separate proceedings after the adjudication of the issues of law and fact contained in the first three causes of action.

The State Board of Social Welfare appealed to the United States Court of Appeals for the Tenth Circuit and the plaintiff nursing home class began, but later dropped perfection of a cross appeal.

The United States Court of Appeals for the Tenth Circuit has affirmed the declaratory judgment of the United States District Court and has ordered the cause remanded to the District Court for the disposition of the reserved claims for supplemental damages. It is at this point that the petition for writ of certiorari is taken.

The Court of Appeals found that some of the claims of the plaintiffs' amended and supplemental complaint were sufficient to state federal questions and form

a basis for jurisdiction and for the exercise of pendent jurisdiction to grant the declaratory judgment on interrelated state issues.

Allegations of a contractual relationship between the plaintiffs and the defendant state board were raised in plaintiffs amended and supplemental complaint. The plaintiffs also therein raised questions of the availability, kind and quality of services provided to welfare recipients. The defendant state board in its amended answer denied the existence of any contractual relationship, denied the plaintiffs standing to raise issues for welfare recipients and denied that plaintiffs are the *de facto* custodians of any rights and remedies of welfare recipients.

The District Court found the existence of an implied contract between the plaintiffs and the State of Kansas through the defendant State Board of Social Welfare and existence of an unilaterial contract between the plaintiffs and the defendant State Board of Social Welfare. The State Board of Social Welfare challenged these contractual findings on appeal and the Court of Appeals noted that the District Court had not discussed the governmental immunity statute and how it might affect the contractual findings. The Court of Appeals also noted that the District Court had found the existence of an implied contract. The Court of Appeals then viewed the state plan, the statutory measure for payments and the license requirements of the State Board of Health and indicated that it felt these formed an understanding of the essential terms for an express contract.

The District Court found in its Conclusions of Law that:

> There is no evidence that plaintiffs are *de facto* custodians of the rights and remedies of the recipients of medical assistance under Title XIX of the Social Security Act and under K.S.A. 39-708(x).
>
> There is no evidence that plaintiffs are the custodians of the rights and remedies of the recipients of institutional and intermediate care assistance under Titles XI and XVI of the Social Security Act and under K.S.A. 39-708(a) and 39-708(s). (United States District Court, Findings of Fact and Conclusions of Law, Appendix, p. 84)

The Court of Appeals also held that: " . . . the plaintiffs as recipients of payments would have standing for themselves and for the interest of those served by them to assert these claims in view of the relationship to the indigents cared for."

Since the taking of the appeal to the Court of Appeals, the State Board of Social Welfare has by Executive Reorganization Order Number I signed by the Governor of Kansas on February 5, 1973, and effective July 1, 1973, codified as K.S.A. 75-5301 to 75-5321 (1973 Supp.), ceased to exist and has been replaced in its functions, including its powers to sue and be sued, by the Secretary of Social and Rehabilitation Services of Kansas, the petitioner.

REASONS FOR GRANTING THE WRIT

1. The decision below improperly assumed pendent jurisdiction to make the factual finding of an express contractual relationship between nursing home providers and a state agency, which findings conflict with the findings of the trial court and with other decisions of the jurisdiction.

The petitioner does not challenge the arising of federal jurisdiction in that certain federal issues have been involved in this matter. Nor does the petitioner challenge the jurisdiction of the federal courts to enter the declaratory judgment as it relates to the federal questions. The petitioner does challenge the assumption by the Court of Appeals of pendent jurisdiction to find and frame the existence of a contract between the plaintiff nursing home providers and the defendant State Board of Social Welfare, a state agency.

The question of paramount importance here is whether such a contract, if it does exist, is in the nature of an express contract or of an implied contract. The question reaches its importance because of the recent decision of this Court in *Edelman v. Jordan,* .... U.S. ...., 94 S.Ct. 685, 38 L.Ed.2d 694 (1974). *Edelman* indicates that a state or state agency may be sued for a declaratory judgment without its consent, but the state or state agency may not be sued for retroactive damages without its consent to waive its immunities under the Eleventh Amendment. *Edelman* also recognizes that there are certain situations in which a state may consent to waive its Eleventh Amendment immunities by statute or agree-

ment. See *Petty v. Tennessee-Missouri Bridge Com.*, 359 U.S. 275, 79 S.Ct. 785, 3 L.Ed.2d 804 (1959). At the time in which the causes of action for this case arose, Kansas statutes provided that: "K.S.A. 39-708(k). All contracts shall be made in the name of 'the state board of social welfare of Kansas,' and in such name the state board may sue and be sued on such contracts." and elsewhere provided that:

> "K.S.A. 46-901. Governmental immunity of state; implied contract, negligence or other tort, except as is otherwise specifically provided by statute:
>
> . . . (2) boards, commissions, departments, agencies, bureaus and institutions of the state of Kansas; and . . .
>
> (3) (c) The state of Kansas and all boards, commissions, departments, agencies, bureaus and institutions and all committees, assemblies and groups declared to be immune from liability and suit under the provisions of subsection (2) of this section shall, in all express contracts, written or oral, with members of the public, give notice of such immunity from liability and suit."

The supplemental claims, which involve retroactive damages, have been reserved by stipulation for trial in separate proceedings after the adjudication of the issues of law and fact contained in the first three causes of action involved in this appeal. These matters relating to supplementary relief have, therefore, not yet been tried. However the issue of the existence

of an implied or an express contract is already ripe and reaches its importance in that it drastically affects the posture of the parties in the forthcoming trial on the supplemental claims and it affects the relationship of the defendant state agency in all its present and past relationships with medical providers.

The United States District Court which made the original contractual findings in the case indicated: "That an implied contract existed between the state through its welfare board, and the plaintiff providers seem clear." (United States District Court, Findings of Fact and Conclusions of Law, Appendix, p. 42-43). "Plaintiffs' class do have contracts with the Board of Social Welfare. They are unilateral in nature." (United States District Court, Findings of Fact and Conclusions of Law, Appendix, p. 81), and, "The only contract plaintiffs have with any agency of the state is one which is unilateral in nature . . . " (United States District Court, Findings of Fact and Conclusions of Law, Appendix, p. 87). After the United States District Court entered its opinion and before the United States Court of Appeals issued its opinion on appeal in this matter, the Kansas Supreme Court entered its decision in *Van Valkenburgh v. State Board of Social Welfare*, 211 Kan. 754, 508 P.2d 875 (1973), which readopted the following language:

> In *Williams v. Board of County Commissioners*, 192 Kan. 548 (389 P.2d 795), the Supreme Court stated at page 551 'It has been held the consent of a state to be sued, as expressed by an (act)

> of the legislature, should be strictly construed so as not to enlarge by judicial interpretation the privilege granted.' The powers and duties of the State Board of Social Welfare are set forth in K.S.A. 39-708. The Court will not quote said statute in detail, suffice it to say that I find no powers and duties of the State Department of Social Welfare which could be made the basis for such an implied contract. On the contrary, whenever programs such as the one herein involved are established, to say that a person coming under their provisions who becomes dissatisfied with the services, even though eligible, can maintain a suit against the state without express provisions therefore by the legislature, would open a Pandora's box of litigation unparalleled even in these changing times. (*Van Valkenburgh*, 211 Kan. at 756, 508 P.2d at 877)

The Court of Appeals then made the following examination of the contractual situation:

> The state defendants challenge the trial court's finding that a unilateral contract existed between the State Board and the plaintiffs. They argue that K.S.A. 39-708(k), which provides for the making of contracts in the name of the Board, contemplates a written document, which was not found to exist in this case; that without such a written contract suit may not be maintained against the Board in view of K.S.A. 39-708(k); that K.S.A. 39-708(x) cannot support a finding of a contract because it is a legislative act and therefore not a contract of the Board; that the Board cannot be a party to an implied contract

because it has retained no funds of a county, state or federal source under Title XIX or Title XVI other than up to one dollar per patient-day for Title XIX skilled nursing homes; that any claim against the Board based on an implied contract was required to be presented to the Joint Claims and Accounts Committee of the State Legislature by K.S.A. 46-901, *et seq.*, which was not done; and that there can be no impairment of a contract right, since none exists.

We feel that the trial court did not err in finding the existence of a unilateral contract. The terms and conditions for performance of services required of the plaintiffs were set forth by the state plans filed with the Secretary of Health, Education and Welfare. Payment pursuant to the statutory standard of reasonable, usual and customary charges became part of the arrangement. See *Securities Acceptance Corp. v. Perkins*, 318 P.2d 1058, 1061 (Kan.). And such a contract may be made binding and mutual by the performance contemplated, and the receipt of promised benefits. *Commercial Asphalt, Inc. v. Smith*, 409 P.2d 796 (Kan.).

The trial court's opinion did not discuss K.S.A. 46-901, the governmental immunity statute. 46-901 does declare that state boards, commissions and the like are immune from liability and suit on an implied contract, among other things. And the trial court's opinion did state that there was an implied contract between the state and the plaintiffs. However, this statement was not made with a view to K.S.A. 46-901, and we feel

it improper to infer any such effect. In view of the plan, the statutory measure of payments and the requirements for licenses granted by the State Board of Health, we feel there was an understanding as to the essential terms. In such circumstances an express contract existed. See *In Re Rogers' Estate*, 334 P.2d 830 (Kan.). *Stark County v. State*, 160 N.W.2d 101 (N.D.), relied on by defendants, is not persuasive since the circumstances recited above support the finding of a unilateral contract in our case.

We agree with the trial court's view that there was a unilateral contract and accept the finding of such a contract under Kansas law.

Considerable discussion has been devoted to the question over the findings of the existence of an unilateral contract. However the question of the contract's unilateral form, if a contract in any form does exist, is of lesser import than the nature of the contract as being implied or express. The District Court considered the contract to be implied in nature and the Court of Appeals affirmed the District Court's opinion while noting the District Court's implied contractual statements. How then may an implied contract be considered express when compared to a governmental immunity statute? The chameleon nature of such a contract is difficult to conceive. The governmental immunity state, K.S.A. 46-901, has just been quoted *supra*, and it does not set forth special rules for the determination of the implied or express nature of contracts other than the considerations which would normally be used in the District Court's first determination of an implied contract.

The Court of Appeals' statements leading to the express contract opinion and the Kansas cases on which these statements rely should be closely examined.

> The terms and conditions for performance of services required of the plaintiffs were set forth by the state plans filed with the Secretary of Health, Education and Welfare. Payment pursuant to the statutory standard of reasonable, usual and customary charges became part of the arrangement. See *Securities Acceptance Corporation v. Perkins*, 318 P.2d 1058, 1061 (Kan.)."
> . . .

Securities Acceptance Corporation v. Perkins, which involved a balance due on a promissory note which had been secured by a chattel mortgage on a new automobile, indicates that state laws in effect at the time of a transaction are a part of the contract. Such a principle is applicable if a contract is first in existence to which the statutes may apply.

The Court of Appeals then notes that: " . . . such a contract may be made binding and mutual by the performance contemplated, and the receipt of promised benefits. *Commercial Asphalt, Inc. v. Smith*, 409 P.2d 796 (Kan.)." A close examination of this case indicates that it's of extremely limited relevance and certainly does not furnish authority to determine the supposedly binding nature of a contract in this instance. The opinion itself notes that it involved an action to cancel an instrument in the nature of a mineral lease which was restricted to sand. It did not

involve unilateral or statutorily effected contracts and no state or state agency was named or involved.

In support of its express contractual statements, the Court of Appeals cites *In Re Rogers' Estate*, 184 Kan. 24, 334 P.2d 830 (1959). This case involved the establishment of an express oral contract between private parties for a claim in a probate proceeding. Because of the presumption that service rendered for a member of the family are ordinarily gratuitous, the essential contractual question was: "Were the services in question to be paid for?" (184 Kan. at 29) Of course the nursing home services in this case were intended to be paid for. However *In Re Rogers' Estate* also indicates: "An express contract exists whenever there is a mutual meeting of the minds upon any contractual proposition." (184 Kan. at 30) How such a mutual meeting of the minds could be achieved from the state plan, the statutory measurement of payments, and the requirements for licenses granted by the State Board of Health and how this meeting of the minds on the part of the defendant could be limited to the State Board of Social Welfare without bringing in the state, the State Board of Health, or other agencies or boards which might be involved, the Court of Appeals does not indicate.

It is not to be supposed that the State Board of Social Welfare paid or was to pay any of its contractual obligations from their personal resources. See *Edelman v. Jordan, supra.* The money for such obligations obviously comes from the state treasury and is subject to all normal constitutional, statutory,

and fiscal restrictions for such monies. It is somewhat simple to determine that an express contract may be framed in general outline by a state plan, a state payment statute, and requirements of another state agency. However if such a determination allows the extent of the suit to proceed to the very specific determinations of the exact terms and requirements of the contract for each provider the situation becomes complex. The opinion of the District Court is replete with references of the fiscal problems faced by the State Board of Social Welfare and its administrative extension, the State Department of Social Welfare. The District Court also indicates that it should exercise restraint in such examinations. Such a philosophy is in keeping with the expression of *Dandridge v. Williams*, 397 U.S. 471, 487; 90 S.Ct. 1153, 1163; 25 L.Ed.2d 491, 503, Reh. Den. 398 U.S. 914, 90 S.Ct. 1684, 26 L.Ed.2d 80 (1970) that:

> . . . the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.

Thus, to find an express contract and to attempt to enforce and define its specific provisions may open a Pandora's Box equal to or exceeding that one expressed in *Van Valkenburgh v. State Board of Social Welfare, supra.*

The Court of Appeals relies upon *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 87 S.Ct. 1130, 16 L.Ed.2d 218 (1966) in support of its

assumption of pendent jurisdiction. *United Mine Workers of America v. Gibbs* indicates that the question of whether pendent jurisdiction has been properly exercised remains through the litigation (383 U.S. at 727). The Court of Appeals has also indicated that: " . . . the views of the resident District Judge on the unsettled law of his state . . . are persuasive and ordinarily accepted. *Sade v. Northern Natural Gas Company*, 483 F.2d 230, 234 (10th Cir.)." However, the Court of Appeals, while affirming the declaratory judgment of the resident District Judge, has contradicted the findings of fact and the conclusions of law of the resident District Judge on the determinations of the contractual relationship between the plaintiff nursing homes and defendant state board. The Court of Appeals also apparently ignored *Landon v. Kansas City Gas Company*, 10 F. 2d 263 (1926) which indicated:

> "Implied contracts are of two classes:
>
> (1) Those implied in fact; and (2) those implied in law. The rule as to the latter is thus stated in Corpus Juris, Vol. 13, p. 244, par. 10:
>
> 'Contracts implied in law, or more properly quasi or constructive contracts, are a class of obligations which are imposed or created by law without regard to the assent of the party bound, on the ground that they are dictated by reason and justice, and which are allowed to be enforced by an action ex contractu. . . . They are clothed with the semblance of contract for the purpose of remedy, and the obligation arises, not from consent, as in the case of true contracts, but from the law or natural equity.' . . . "

The reasoning of *Landon v. Kansas City Gas Company*, that quasi contracts or contracts implied in law are not true contracts, has been adopted in Kansas decisions as recently as 1973 in *Minnesota Avenue, Inc. v. Automatic Packagers, Inc.*, 211 Kan. 461, 507 P.2d 268.

The Court of Appeals for the Tenth Circuit did recently find the existence of a contract between administrators, trustees, and county commissioners who operated a county hospital providing hospital services under the Hill-Burton Act and the State of Colorado in *Euresti v. Stenner*, 458 F.2d 1115 (1972). *Euresti* discussed the intentions of the Hill-Burton Act to provide hospital services for indigents. It indicated that a civil remedy might be implied for those indigents "within the protective realm of legislation or regulations in the public interest." (458 F.2d at 1118) *Euresti* also found:

> Even if a contractual relationship were required, we find it exists here. The contract between the appellees and the State of Colorado explicitly incorporates the federal statutory obligation. In turn, the State's obligation to provide assurances of compliance is the sine qua non for the furnishing of federal funds. Indeed, appellee's obligation is set out specifically in the closing papers signed by the hospital, the State and federal authorities. Nothing could be clearer: In receiving federal funds, appellees obligated themselves to dispense a reasonable amount of free hospital services to those unable to pay. (458 F.2d at 1118-1119)

Euresti did not discuss the specific nature of the contractual relationship and in not enforcing the remedies against the state party to the contract it did not reach the questions of state immunities.

In spite of the findings of contractual relationship in both the present case and in *Euresti*, the two decisions are difficult to reconcile in view of *Edelman v. Jordan, supra. Euresti* indicates the necessity of allowing the intended beneficiaries of legislation the rights to enforce their intended benefits. The present case apparently expresses the same intentions for the benefit of nursing home providers named in legislation. It would seem that indigent welfare recipients are also intended beneficiaries of both the Social Security Act and K.S.A. 39-708. The nursing homes as providers of medical services for which they are to be paid may have been herein held to have an express contractual relationship with a state agency which may give them rights to sue for retroactive contractual damages under a constructive waiver of the state's Eleventh Amendment immunity. The indigent welfare recipients, on the other hand perform no such paid services for the state and may lack the standing of having express contracts and may, under the interpretations of *Edelman v. Jordan, supra,* lack the right to seek retroactive damages. Or if indigent welfare recipients who are receiving medical services are given the right to enforce contracts between medical providers and the state agency as third party beneficiaries to those contracts, these welfare recipients are given superior rights to other welfare recip-

ients who do not have the benefit of being in the status of receiving services from medical providers.

2. The decision below improperly failed to indicate that a contractual relationship, if existent, between nursing home providers and a state or state agency should include all state constitutional and statutory provisions which relate to the existence, performance and enforcement of any contract or agreement between nursing home providers and the state or state agency or state agencies.

The Court of Appeals cited *Securities Acceptance Corporation v. Perkins, supra,* in its opinion. Assuming *arguendo* that a contract does exist in the present case, *Securities Acceptance Corporation v. Perkins* should have an effect on that contract greater than merely incorporating the state plan and the statutory standard for payments into the contract terms. All state constitutional and statutory provisions in effect at the time of the contract should be incorporated into the contract. The opinion of the District Court also indicated that other statutory law should effect the contract.

> "20. The only contract plaintiffs have with any agency of the State is one which is unilateral in nature and which is enforceable only to the extent plaintiffs provide services to welfare recipients under applicable provisions of statutory law not in conflict with the Constitution or the statutes authorizing them. (United States District Court, Findings of Fact and Conclusions of Law, Appendix, p. 87)

K.S.A. 46-901, the governmental immunity statute,

affects any state or state agency contract and should be included in the terms of such contract. Indeed, if the contract is supposed to be express, K.S.A. 46-901 (3) (c) requires that members of the public be given notice of the effects of K.S.A. 46-901 on the contract.

It has already been noted that monies to perform obligations of a contract of either the state or a state agency must in some manner come from the state treasury. See *Edelman v. Jordan, supra,* and *Ford Motor Co. v. Department of Treasury,* 383 U.S. 459, 65 S.Ct. 347, 89 L.Ed. 389 (1945). Expenditures of such monies for a state agency in Kansas are subject to the provisions of Article 2, Section 24 of the Constitution of Kansas which states:

> Appropriations. No money shall be drawn from the treasury, except in pursuance of the specific appropriation made by law, and no appropriation shall be for a longer term than two years.

Thus the appropriation statutes themselves may need to be included in the contract formation.

To attempt to frame a contract between the state or state agency or state agencies and members of the public without full reference to all constitutional and statutory provisions affecting the state's ability to perform is to ignore the true nature of the parties' rights and remedies under the contract.

3. The decision below improperly indicates that nursing home providers have standing to assert the claims of indigent welfare recipients for which they may provide care.

The District Court found in favor of the defendant

state board's denials of the nursing home providers' standing to assert claims for indigent welfare recipients:

> There is no evidence that plaintiffs are *de facto* custodians of the rights and remedies of the recipients of medical assistance under Title XIX of the Social Security Act and under K.S.A. 39-708(x).
>
> There is no evidence that plaintiffs are the custodians of the rights and remedies of the recipients of institutional and intermediate care assistance under Titles XI and XVI of the Social Security Act and under K.S.A. 39-708(a) and 39-708(s). (Conclusions of Law, no. 6, p. 125.)

The Court of Appeals relies upon three cases: *Harmony Nursing Home, Inc. v. Anderson*, 341 F.Supp. 957, 959; *Sierra Club v. Morton*, 405 U.S. 727, 737; and *Barrows v. Jackson*, 346 U.S. 249, 256-258, for its statement: " . . . the plaintiffs as recipients of payments would have standing for themselves and for the interest of those served by them to assert these claims in view of the relationship of the indigents cared for."

Harmony Nursing Home does indicate that a plaintiff nursing home may have standing for itself in a controversy such as this. No standing for the claims of third parties is expressed in this opinion. *Sierra Club v. Morton* does indicate that a party having shown an economic injury may advance arguments in the public interest. Such rights of argument were clearly accorded to the plaintiffs in this case and the

decision of the District Court reflects numerous findings of the quality and availability of care which has or has not been made available to indigent welfare recipients. However the indication that plaintiffs should be able to assert actual claims of indigent welfare recipients is not a right included in the advancement of public interest. Nor is such a right or standing authorized by *Barrows v. Jackson*. *Barrows v. Jackson* allowed the vindication of constitutional rights for third parties who had no ability to assert their own rights in that action. The Court of Appeals for the Tenth Circuit has already indicated in *Euresti v. Stenner*, *supra*, that indigent welfare recipients may enforce their rights either as third party beneficiaries to contracts between providers and states or by the implication of civil remedies from their protective statutes. To allow medical providers, who, as demonstrated in *Euresti v. Stenner*, *supra*, may have separate standing and differing interests, the right or standing to advance claims of indigent recipients is to in effect displace the rights recently accorded indigent welfare recipients in *Euresti v. Stenner*, *supra*.

CONCLUSION

The decisions of the Court of Appeals on the standings and contractual status of the parties are final and for the reasons above indicated, a writ or certiorari should issue to review the judgment and opinion of the Court of Appeals of the Tenth Circuit. If this Court desires that the issues of the possible waiver of the Eleventh Amendment be more fully presented,

then this Court may wish to defer action on this petition until after final judgment has been entered on the reserved claims for supplemental relief.

Respectfully submitted,

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APPENDIX

Civil Action No. T-4779

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

SENECA NURSING HOME, *et al*,
Plaintiffs,

VS.

THE KANSAS STATE BOARD OF SOCIAL WELFARE, *et al*,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

STATEMENT

Filed Aug. 4, 1971

This action was instituted as a class action by plaintiffs who operate under appropriate licenses granted by the Kansas State Board of Health, either as "Skilled Nursing Home" or as "Personal Care Home." It involves the interpretation and application of certain laws, regulations and policy declarations of both the federal and state agencies charged with the administration of the various programs established under the Social Security Act.

The act is the collective name for a series of measures by the terms of which the Federal Government

undertook to make, to such states as should adopt administrative plans complying with federal standards, grants in aid of state programs. The Act was designed for the protection of society and was enacted to alleviate the burdens which rest on large numbers of the population because of the insecurities of modern life, particularly those accompanying old age.

A state statute intended to place the state in a position to take advantage of the benefits tendered under the Federal Act should be construed in relation to the purpose and objectives of that Act. In any case, words used in such a statute should be given their ordinary signification if possible.

The determination of issues in this proceeding will, generally speaking, require consideration of Title XVI and Title XIX involving the administration by the state of its nursing home program under such title, and Title XVIII to the extent limitations of payments it provides have reference to such program, and Title XI dealing with aid to the aged, blind and disabled not otherwise provided for.

Although many subsidiary issues and questions are raised, the principal claim of plaintiffs revolves around the interpretation and application of K.S.A. 1970 Supp. 39-708(x), enacted by the Legislature, effective July 1, 1967, which then provided:

> "The state board shall take such action as may be necessary to assure that licensed practitioners within the scope of their practice as defined by state law who provide professional services under the provisions of the federal social security act shall be paid their reasonable, usual and customary charges. Payments for other medical as-

> sistance under the provisions of the federal social security act shall be the reasonable, usual and customary charges: Provided, however, That if such payments are otherwise limited by federal law, such payments shall be as near the reasonable, usual and customary charges as may be permitted by federal law."

In the Session of 1971, the Legislature amended this subsection of the statute to read as follows: (Noting the change contained in House Bill 1629, effective July 1, 1971.)

> "(x) The state board shall take such action as may be necessary to assure that persons, firms and corporations selling property or providing services and licensed practitioners, within the scope of their practice as defined by state law who provide professional services under the provisions of the federal social security act, shall be paid their reasonable, usual and customary charges. Payment for other medical assistance under the provisions of the federal social security act shall be the reasonable, usual and customary charges: Provided, however, that if such payments are otherwise limited by federal law, such payments shall be as near the reasonable, usual and customary charges as may be permitted by federal law."

The legislative history out of which this statute and its amendment developed has not been disclosed by the evidence but certainly it is a fair inference that the Legislature intended to direct that those licensed practitioners and those supplying other medical assistance under the Federal Social Security Act be

paid "reasonable" charges as distinguished from "reasonable, usual and customary" charges, and that a different approach to the payment of charges was intended.

In April, 1967, there was issued by the division of the federal agency administering the federal government's responsibilities under the Act, a Handbook of Public Assistance Administration, Supplement D, relating to medical assistance programs and particularly dealing with payments for Medical and Remedial Care and Services. (Secretary's Exhibit H.) The federal agency recognized the need to establish such fee structures for medical care and services as would enlist participation of a sufficient number of providers of services (nursing homes) so that such care and services would be available to eligible persons.

This directive also provided that participation in the program will be limited to providers who accept, as payments in full, the amounts paid in accordance with the fee structures, except that application of this limitation could be delayed by the state under certain conditions.

On June 18, 1970, was issued SRS Program Regulation 40-4 (C-2) (Exhibit 12), described as "Reasonable Charges Amendment." This regulation reads in part:

> "Section 250.30(b) (3) (ii) is revised to read as follows:
> "§250.30 Reasonable Charges.
>
> * * *
>
> "(b) * * *
> "(3) * * *

"(ii) Skilled nursing home services, outpatient hospital services, and clinic services. Customary charges which are reasonable. Schedules of payments established by the State agency shall not exceed the combined payments received by providers (for furnishing comparable services under comparable circumstances) from the intermediaries or carriers under title XVIII and beneficiaries under title XVIII of the social security act. Schedules will be acceptable if within the upper limits either on a facility by facility basis or on the basis of average payments according to a reasonable classification of facilities based on levels of care.

"(In case of providers which are not participating under title XVIII, a financial audit of the facilities to apply the title XVIII-A reimbursement principles is not required but the State shall establish schedules of charges which are consistent with the intent that upper limits do not exceed amount paid under title XVIII-A for similar services.)

"(Section 1102, 49 Stat. 647, 42 U.S.C. 1302)"

The State Welfare Director, realizing that a state plan relating to the care for eligible recipients under applicable provisions of the Act, in which state participation is sought under provisions of federal laws, regulations and directives, was required, directed that an acceptable state plan be provided in order to arrange for the effective use of nursing homes serving the needs of welfare patients, for the clarification of confusing procedures and for fair and adequate payment to such homes for services rendered, and to comply with requirements and conditions imposed by HEW.

A Manual containing a program for adult care homes was developed and adopted (Exhibit 2). This Manual made a good many changes in the administration of the medical and remedial care policies of the state. The direct control in a single state agency rather than the administration of the program by 105 separate county welfare boards was contemplated. Payment for services was changed from a "reasonable charge" criteria to a cost plus profit, restricted nevertheless to a "top limit," whichever was the less. A somewhat complicated formula was provided for calculating the cost plus profit figure. Furthermore, the State Welfare Department taking account of the funds made available to it by the Legislature for making payments to nursing homes for services, fixed an arbitrary ceiling of $11.00 per day to providers operating the homes.

Several other provisions cast burdens upon providers, e.g., the necessity of furnishing audits periodically from which calculations could be made of their costs, and the requirement that where clients in a home are given intermediate care, then a distinct portion of the facility for such care must be designated and set apart.

Plaintiffs complain that the regulations, directives and Manual are void and unauthorized by law, and that defendants should be permanently enjoined for putting them into effect.

THE FEDERAL REGULATIONS

The Court permitted the Secretary of Health, Education and Welfare to be made a party because it was contended that unauthorized regulations and direc-

tives of the agency required or permitted the State Board to invoke conditions that unreasonably and unlawfully interfered with the plaintiffs' alleged contractural rights, in addition to denying them due process and equal protection of the law and because there is involved a federal question arising under the laws of the United States in that the petition asks for an interpretation of the Federal Social Security Act and the determination of validity of regulations adopted by HEW pursuant thereto.

It is my conclusion, after reviewing the entire record of the case, that the Secretary is authorized to make and publish rules and regulations, not inconsistent with the Social Security Act, as may be necessary to the efficient administration of the functions with which he is charged under the Act. (42 U.S.C. § 1302.) The terms and provisions of 42 U.S.C. § 1396 do not restrict such authority.

While Section 1396a(a), in defining what a state plan for medical assistance must include, provides for payment of "reasonable cost" (as determined in accordance with standards approved by the Secretary and included in the plan) for in-patient hospital services and for mental patients receiving institutional care, 1396a(a) (30) speaks of payments for care and services available under the plan that shall not be in excess of "reasonable charges" consistent with efficiency, economy, and quality of care. Thus, plaintiffs urge that 45 C.F.R. 250.30 (b) (3) (ii) provides for a right to reimbursement by way of reasonable charges under Title XIX and XVI, but is limited to those payments made for comparable services under Title XVIII which are established on the basis of costs as distinguished from reasonable charges, and are, therefore, inconsistent.

Section 1396a (a) (30) places a ceiling on the amount which may be paid for services rendered under the Medicaid Program, that ceiling being "reasonable charges consistent with efficiency, economy, and quality of care." 45 C.F.R. 250.30 (b) (3) (ii), in implementing § 1396a (a) (30), provides that payments to skilled nursing homes under the Medicaid Program shall not exceed the payments received by providers under Title XVIII (Medicare Program) of the Social Security Act. Under Title XVIII, skilled nursing homes and other providers are entitled to the "reasonable costs" of their services. The costs are included within the purview of § 1396a (a) (30).

After reviewing the legislative history of Section 1396, I conclude that the Secretary did not abuse his authority in selecting a method of payment to be based on reasonable costs and that a distinction between reasonable charges and reasonable costs is not established by anything in the history of the legislation.

Thus, the pertinent directives, rules and regulations adopted by the Secretary of Health, Education and Welfare are not inconsistent with the Act and are determined to be reasonable regulations authorized by and consistent with the proper administration of the Act.

THE CASE AGAINST STATE BOARD OF SOCIAL WELFARE

The Court regrets that the urgency of the decision in this case and the press of other litigation, the disposition of which is too long delayed, forbids the extensive analysis and discussion of all the points raised in this case.

As to defendants State Welfare Board, its Director and its members, it is enough to note that this case involves the administration by the State of the nursing home program established in the State pursuant to Title XVI and Title XIX of the Act, 42 U.S.C. § 1381 and § 1396. The State, though not required to participate in the programs, may do so and be reimbursed, in part, of the costs incurred, provided the programs are administered in accordance with requirements of the Federal statutes and regulations.

The programs are administered by the states through a state agency which may utilize local subdivisions of state government to supervise such administration, but in any event, the relationship of the homes in performing the service for which payment is due them, is directly with the state agencies and not with the federal agency.

If the State elects to participate in the programs, it must submit to the Secretary a plan which meets the conditions and requirements of Federal law and regulation. When approved, the plan provides the basis on which the Federal Government and the State, in cooperation, carry out the intent and purpose of Congress in establishing and implementing the programs. The state agency has submitted a plan to the Secretary. It has been approved in conformity with rules and regulations adopted by the HEW, as authorized by law.

Regulations providing that agency payments to skilled nursing homes may not exceed payments made to extended care facilities under Title XVIII for comparable services (45 C.F.R. 250.30 (b) (3) (ii), that a provider must accept the agency's payment as payment in full and forbidding the acceptance of sup-

plemental payments from third parties for a recipient's benefits, (45 C.F.R. 249.31), I have now determined to be authorized and not unreasonable.

Nor are requirements for utilization review of care in skilled nursing homes, as well as provision for medical review and inspection of them, deemed unreasonable, unauthorized or inconsistent with law.

The same may be said of regulations providing for reviews of intermediate care facilities.

The direction that an intermediate care facility and a skilled nursing home facility be maintained in such a way as to provide a distinct portion of the facility for such uses is not an unauthorized or unreasonable requirement.

The contention that only the State Board of Health has legal authority to promulgate standards and procedures relating to the care and treatment of individuals in nursing homes precludes the Department of Social Welfare from establishing policies and regulations and the Nursing Manual, cannot be sustained in view of the fact that the State, having elected to accept reimbursement from the federal agency, is required to select an agency to carry out and supervise the administration of the program. The State established the Department of Social Welfare for that purpose and authorized and directed it to carry out such function. K.S.A., 1970 Supp. 39-708(a) and (b).

Plaintiffs seriously contend that the procedures required in the Manual for reimbursement are unauthorized and unreasonable and should be declared so. It is here that conflict does arise. The Director of the State Department of Social Welfare set up, under Chapter VIII of the Manual, a procedure involving accounting methods, the maintenance of

records, and the filing of reports by vendors to establish "allowable costs" of the vendor as a basis for reimbursement. The formula proposed provided for certain additions to be included in the determination of "costs," and for an incentive bonus in those cases where costs of the vendor were below the "top limit" as fixed by the Department.

Before July 1, 1971, this directive was in conflict with K.S.A., 1970 Supp. 39-708(x), which required payments for vendors' services under provisions of the Federal Act, "shall be the reasonable, usual and customary charges." It cannot be doubted that payment on the basis of "allowable cost" contravenes the statute then existing.

The amendment of this statute by the Legislature, effective July 1, 1971, as heretofore noted, had as its legislative purpose the elimination of "usual and customary charges" and substituted, in conformity with policies developed by the Secretary, permissive methods of determining and establishing that costs could be considered in determining "reasonable charges." In considering whether the fixing of a "top limit" or "ceiling" on payments to be made to vendors is within the authority of the Director, if approved by the Board, several considerations must be taken into account. The Legislature now requires only that "payment for other medical assistance under provisions of the federal social security act shall be reasonable charges," eliminating the "usual and customary" requirement.

At the same session of the Legislature, appropriations were voted to provide the Director with State funds necessary to fulfill the State's obligation under the Act. The amount appropriated was apparently

the estimate of the Legislature as to what funds the State had available to be used for that purpose, though it does appear that supplemental appropriations are sometimes made to provide additional funds, if such funds are later available to be appropriated, although this is not mandatory on the Legislature. In all events, the enactment of these statutes by the Legislature at the same session, relating to the same subject, have a common purpose, i.e., to provide for payment of services under the adult care program supervised by the Department of Welfare within the ability of the State to do so. When the Director is faced, under such circumstances, with the necessity of spreading the available funds to meet the payments anticipated for a fiscal year, he cannot ignore the realities of fiscal responsibility. Good business practices and common sense dictate that some limitation must be placed on public expenditures where funds for payment of obligations are not unlimited. The obligation of the State Welfare Board to continue payment of reasonable, usual and customary charges is not interminable, but exists only as long as the Legislature, by its positive direction, requires it. Plaintiffs acquired no vested interest under the law to receive such charges.

The plaintiffs, supplying the services as they did, contend that they had a contract with the state agency, which agency had power to be sued on its contracts and that the actions of the State amounted to the making of a contract which the State Board now undertakes to change, thus impairing the obligation of such contract.

That an implied contract existed between the State, through its Welfare Board, and plaintiff providers

seems clear. The then existing statutes authorized such contracts, which were not required to be in writing, and furthermore made mandatory the basis of payment to be made for services provided to welfare clients of the State by persons in the class with plaintiffs.

From these facts, the Court is bound to conclude that plaintiffs' class prior to July 1, 1971, are entitled to be paid the reasonable, usual and customary charge for the class of services rendered under provisions of the then existing law. See K.S.A. 39-708 and amendments and definitions in K.S.A. 39-702 and amendments.

Other issues have been considered but the foregoing outlines the material factor determinative of the plaintiffs' claims.

After considering the previous rulings of the Court, the evidence, the briefs and arguments of counsel, the deposition, the admissions and stipulations, the pretrial order, and upon being fully advised in the premises, the Court makes the following:

FINDINGS OF FACT

1. The jurisdictional facts required under 28 U.S.C. 1441 and 1331 have been established because the issues for adjudication involve the claims and rights of the parties arising under the Federal Social Security Act, Title 42 U.S.C., Article 7, and the amount in controversy exceeds Ten Thousand Dollars ($10,000); jurisdiction exists independently under 5 U.S.C. 701, 702, et seq., because the validity of administrative actions of the Secretary are placed in issue for adjudication, such actions have adversely

affected the plaintiffs, and there is no other adequate remedy available to plaintiffs; the conditions required under Rule 19 exist for the proper joinder of the Secretary and under 28 U.S.C. 1391(e) venue in this Court and jurisdiction over the person of the Secretary is established; the relief sought for a declaratory judgment is proper under 28 U.S.C. 2201 and 2202; and by stipulation approved by the court the matter of supplemental relief has been reserved for disposition after the adjudication of the controversy and the rights of the parties. The plaintiffs represent the class of adult care homes and administrators licensed as nursing homes and personal care homes pursuant to K.S.A. Chapter 39, Article 9.

(Stipulation 2 & 3; testimony of Stolz and Al Sammon.)

2. The plaintiffs' class are the facilities and the administrators of nursing homes and personal care homes licensed to provide the medical services and care required under K.S.A. Chapter 39, Article 9, by the Kansas Board of Health. Under regulations adopted by said Board all such homes are included under the name of adult care homes and the license which is issued runs to the administrator personally and to the facility. Plaintiffs' class in providing such services are providing medical assistance as defined in K.S.A. 39-702, which defines terms as used in the Statutes defining the powers and duties of the Kansas Board of Social Welfare, and are licensed providers of medical services within the meaning of K.S.A. 39-708(x).

(Stipulation 3; Testimony of Dr. D. V. Preheim and Board of Health Regulations and admissions of Board of Social Welfare in exhibits and witnesses.)

3. The plaintiffs are authorized and do provide "skilled nursing home care" under licenses as "nursing homes" and provide "simple nursing care" under licenses as "personal care homes." The State Board of Social Welfare is an agency of the State of Kansas established pursuant to K.S.A. 75-3301, et seq., and with duties defined in K.S.A. Chapter 39, Article 7; this Board has established programs under Titles I, X, XI, XIV, XVI and XIX of the Federal Social Security Act, 42 U.S.C.A. Chapter 7, under which persons receive the said services provided by the plaintiffs under their respective licenses issued by the Kansas State Board of Health. The classes of homes are licensed by the Kansas Board of Health to provide the levels of medical and health services and care as defined by the Board of Health with the skilled nursing homes being required to provide the services commonly performed by or under the immediate supervision of a licensed registered nurse. The personal care homes do and are required to provide the selected acts in the care of the ill, aged or infirm requiring certain knowledge and specialized skills, but not requiring the substantial specialized skills, judgment and knowledge required in skilled nursing care.

(Stipulation 1 & 4.)

4. The Regulations governing all adult care homes (all classes of licenses) issued by the Kansas Board of Health are contained in Agency 28 of the Kansas Administrative Regulations, Article 38. These Regulations were published as provided in K.S.A. Chapter 77, Article 4, and are contained in defendant State's Exhibit D.

(Stipulation 5.)

5. Patient-residents are admitted to adult care homes (homes of all classes) only after the care referral form 300 or a comparable form is completed by the physician of the patient, and the physician's orders (form 500) prescribing the medications, treatments, diet and activities must also be completed. (Cf. Reg. 28-38-14; 28-38-22; 28-38-23.)

(Stipulation 6; Testimony of Dr. D. V. Preheim and L. E. Stolz.)

6. Under the said Regulations, the patient must be under the care of a physician at all times while he is in the adult care homes and nursing notes must be kept as provided on form 400. (Cf. KAR 28-38-14 A.2.)

(Stipulation 7 & 8.)

7. The Kansas State Board of Social Welfare under K.S.A. Chapter 39, Article 7, is charged with the duty to develop State plans for providing care and assistance to the chronically ill and infirm aged persons qualified for assistance under Federal Law in the Federal Social Security Act and to determine the State policies, and administer and supervise the programs under such plan not inconsistent with Federal and State law. By Federal law participation in such programs gives to all qualified recipients the right to receive the assistance provided for under the said plans which are approved by the Secretary. The State Board of Social Welfare is charged with the duty to provide a system within Kansas to make such assistance available throughout the State, and the 105 County Boards of Social Welfare administer the programs under the direction of the Defendant State Board of Social Welfare and the said County Boards initially determine the qualification of each recipient.

Upon the entry of a qualified recipient into, or upon the determination by the County Department of Social Welfare of the qualification of a patient who at the time of applying is a resident patient in an adult care home, and upon the furnishing of services to the qualified recipient thereafter by the plaintiffs, the State Board of Social Welfare is obligated to pay for the services so furnished, and under K.S.A. 39-708(x) the said State Board is required to:

> ". . . take such action as may be necessary to assure that licensed practitioners within the scope of their practice as defined by state law who provide the professional services under the provisions of the Federal Social Security Act shall be paid their reasonable, usual and customary charges. Payments of other medical assistance under the provisions of the Federal Social Security Act shall be the reasonable, usual and customary charges. Provided, however, that if such payments are otherwise limited by federal law, such payments shall be as near the reasonable, usual and customary charges as may be permitted by federal law."

Payments for such services have been and are being made directly to these plaintiffs' class providers as vendor payments (pursuant to plans approved by the Secretary under Titles XIX and XVI of the Federal Social Security Act) by the State Board.

(Stipulation 9.)

8. K.S.A. 39-708(x) was amended by the laws of 1971 as contained in House Bill 1629 (State Defendant's Exhibit B) to provide as follows, and be effective July 1, 1971:

"The state board shall take such action as may be necessary to assure that persons, firms and corporations selling property or providing services and licensed practitioners, within the scope of their practice as defined by state law who provide professional services under the provisions of the federal social security act, shall be paid reasonable charges. Payment for other medical assistance under the provisions of the federal social security act shall be reasonable charges: Provided, however, that if such payments are otherwise limited by federal law, such payments shall be as near the reasonable charges as may be permitted by federal law."

(Stipulation 10.)

9. The State of Kansas is receiving Federal funds under "plans" filed with the Department of Health, Education and Welfare under the Federal Social Security Act: Sub-Chapter I—Grants to States for Old-Age Assistance and Medical Assistance for the Aged (42 U.S.C.A. Sections 301, et seq.); Sub-Chapter X—Grants for States for Aid to the Blind (42 U.S.C.A. Sections 1201, et seq.); Sub-Chapter XIV—Grants to States for Aid to the Permanently and Totally Disabled (42 U.S.C.A. Sections 1351, et seq.); Sub-Chapter XVI—Grants to States for Aid to the Aged, Blind, or Disabled, or for such Aid and Medical Assistance for the Aged (42 U.S.C.A. Sections 1320a-1324) and under provisions in Sub-Chapter XI (42 U.S.C.A. 1320a), is providing assistance under Title XVI in the form of institutional services in intermediate care facilities; and the State has further filed plans and is receiving Federal funds under Sub-

Chapter XIX—Grants to States for Medical Assistance Programs (42 U.S.C.A. Sections 1396, et seq.).
(Stipulations 11 & 15.)

10. Under the provisions of K.S.A. 39-701, et seq., the Kansas Department of Social Welfare is designated as the single state agency to administer the before-stated programs, and the County Boards of Social Welfare of the various 105 Counties act as agents in carrying out the said programs and are subject to the direction of the State Board; said agency is also designated as such in the approved plans filed under Titles XIX and XVI.
(Stipulation 12.)

11. The Kansas Board of Health has been designated, under the said plans approved by the Secretary, as the State authority which shall be responsible for establishing and maintaining standards for private or public institutions in which recipients under the plans may receive care or services; this is required for state plans in 42 U.S.C.A. 1396(a) (9) and 1382 (a) (9).
(Stipulations 23 & 24; State Plans Exhibit D & G; Testimony of defendants.)

12. The United States Department of Health, Education and Welfare published a "Handbook of Public Assistance Administration Supplement D, Medical Assistance Programs," dated June 17, 1966, as a part of the handbook system of the Bureau of Family Services of the Welfare Administration, Department of Health, Education and Welfare. The said "Supplement D" contains the official directives of the department for grants to states for medical assistance programs under Title XIX of the Social Security Act

and provides the requirements for the Secretary's approval under the Act of the said State plans for medical assistance under Title XIX (Plaintiffs' Exhibit 3). Since its adoption, various resolutions have been adopted superseding portions of the Supplements.

(Stipulations 13 & 14.)

13. Since July 19, 1968, Kansas has defined the scope of adult homes services provided by the state to recipients of public assistance to be homes with "the professional registered nurse or licensed practical nurse on duty." (State defendant Exhibit F; and KAR 30-5-22, as of January 1, 1968, Plaintiffs' Exhibit 4).

14. The State and the Federal Government cooperate in the providing of institutional services in the form of adult care homes services to the needy and qualified recipients under Titles XIX and XVI. (K.S.A. 39-708(a) and Brief of defendant, Elliot L. Richardson, Secretary of Health, Education and Welfare filed in support of his motion to dismiss on March 26, 1971, page 2, paragraph 2.)

15. The defendant Secretary does, through various written directives and regulations, require the inclusion of certain provisions in State plans to be submitted and approved by him under the Federal Social Security Act.

(Stipulation 14.)

16. The Title XIX plan was filed by the State of Kansas on July 10, 1968, and approved by the Secretary and is admitted into evidence as State defendant's Exhibit D and defendant Secretary's Exhibit K. (In the State plan, there are designated the various

cross-references to appropriate provisions in the said Supplement D, Plaintiffs' Exhibit 3.)

(Stipulation 15.)

17. The State Board of Social Welfare, to implement the administration of the programs adopted, filed Regulations with the Kansas Revisor of Statutes which are published by him in the Kansas Administrative Regulations pursuant to K.S.A. Chapter 77, Article 4. The Regulation defining the "Scope of Nursing Home Services" is contained in Regulation 30-5-22. (Plaintiffs' Exhibit 4.) As that Regulation was in force until December 4, 1969, it established the basis under which the plaintiffs provided institutional care under both the Title XIX and the program for intermediate care under Titles XI and XVI; it provided that the nursing home services to eligible recipients of assistance under both programs could only be provided under the direction of a physician as required by the rules of the Board of Health; such recipients were entitled to skilled nursing home care, either in a skilled nursing home licensed by the State Board of Health or in an establishment which has on its staff a registered nurse or licensed practical nurse.

(Stipulation 16.)

18. Under the emergency regulation (Plaintiffs' Exhibit 5), amending said section effective December 4, 1969, the services to be provided for skilled nursing care were limited to those licensed by the State Department of Health and meeting the regulations of the U.S. Department of Health, Education and Welfare for skilled nursing care service under the Title XIX program; and further the said amended regulation stated that utilization of skilled nursing home

care is subject to review and decision by a review committee at the state level. The said emergency regulation was in effect at the time of the filing of this action and issuance of the temporary injunction on July 21, 1970. On August 5, 1970, the Board amended the said Regulation 30-5-22 (Plaintiffs' Exhibit 6), as quoted in full in paragraph 2(d) on Plaintiffs' Second Cause of Action. In this amendment the "Scope of Adult Care Services" covers services for which the state provides coverage under both Title XIX and Titles XI and XVI; it limits the services under Title XIX to skilled nursing homes licensed by the State Department of Health and meeting the requirements of the U.S. Department of Health, Education and Welfare for skilled nursing home services under Title XIX; it provides that the Department of Social Welfare may provide coverage for eligible recipients who need adult care home services less than skilled nursing services (as defined by HEW), these latter services may be defined by the State Department of Social Welfare in accordance with requirements of the Department of Health, Education and Welfare; the amendment also made the coverage for such services subject to a review by local and state utilization review committees.

19. The plan for Title XVI, under which intermediate care was provided was not formalized into a written plan and filed as such on July 18, 1968, but was by practice instituted and funded by the Secretary at all times subsequent (see State Defendant's Exhibit H, letter of McDermot to Harder, April 10, 1970); that it was not until April 17, 1970, that a formal written plan for Intermediate Care Facilities was filed with the Secretary and "accepted for in-

corporation" by the Secretary on July 14, 1970 (State Defendant's Exhibit G); under this written plan there was defined two "levels of care" to be provided by the Department of Social Welfare; this was done after the new Manual program (Plaintiffs' Exhibit 2) was commenced on July 1, 1970.

20. The Regulations as they were amended purported to authorize the State Department of Social Welfare to establish levels of care and standards for adult care home services, which authority was vested at all times in the Kansas Board of Health, pursuant to K.S.A. Chapter 39, Article 9.

(Plaintiffs' Exhibits 4, 5 & 6.)

21. The P.L. 90-248, Section 234(a) added paragraphs (26, 27, 28, 29 and 30) to the said Title XIX program, which amendments appear in 42 U.S.C.A. Section 1396a(a) (26-30). These amendments were made effective January 1, 1969, except (26) which was made effective July 1, 1969; and (29) which was made effective July 1, 1970.

(Stipulation 17.)

22. Prior to said amendment, the said Supplement D, Section D-5141, Item 4.1, defined a skilled nursing home as providing a twenty-four hour nursing service under the direction of a registered professional nurse and requiring twenty-four hour nursing services. That said definition in Supplement D (Plaintiffs' Exhibit 3) continued to be the basis for defining the scope of nursing homes services under Title XIX until the publication in the Federal Register, June 24, 1969, Volume 34, 120 (Plaintiffs' Exhibit 7), of an amendment to the Code of Federal Regulations, Title 45—Public Welfare, part 249—Services and Payment

in Medical Assistance Programs, Section 249.10(b) (4) (1) Skilled Nursing Home Services (h). However, from July 19, 1968, the Kansas Plans for Titles XIX, XVI and XI have been implemented as stated before.

That on January 9, 1969, the Kansas Director of Social Welfare, by directive, informed County Boards and Plaintiffs' class that certain changes were being required by the Secretary in defining standards for skilled nursing homes and intermediate care facilities (See Def. Exhibit K-1). Although there had been no changes in the standards set by the Kansas Board of Health (requiring that patients be at all times under the "immediate supervision of a licensed registered nurse"), the directive stated that for skilled nursing homes licensed registered nurses or licensed practical nurses must be on duty at all times "24 hours a day," and for intermediate care facilities a registered or licensed practical nurse must be employed full time and on duty during the day shift. This directive was consistent with the Secretary's Interim Regulation (Plaintiffs' Exhibit 7) dated June 24, 1969, and the final regulation as it was issued by him under the authority stated by him to be contained in 42 U.S.C. 1302 and 1396a(a) (28).

(Stipulation 18, Exhibits identified.)

23. The standards established and maintained by the Kansas Board of Health for adult care homes which provide skilled nursing care and services does by medical standards constitute an organized nursing service for patients which is under the direction of a professional registered nurse who is employed full time by such adult care nursing home (providing skilled nursing care), and which standards require

such homes to have sufficient nursing and auxiliary personnel to provide adequate and properly supervised nursing services for such patients during all hours of each day and all days of each week; that such standards are adequate for the delivery in Kansas of skilled nursing care to the general population and have not only been established as sufficient by the Board of Health standards since 1963, but also have been considered adequate by the Committee on Aging of the Kansas Medical Society which consulted with the said Board in the development of its regulations.

24. The number of public assistance recipients as of May 31, 1971, being provided services by licensed adult care homes in Kansas is 9,812 beds out of a total of nearly 20,516 licensed beds, and constitutes 47.8% of all of the beds available for services by the said adult care homes licensed in Kansas.

25. The average bed capacity of presently licensed adult care homes in Kansas is 44.05 beds. (Stipulation 21.)

26. The State Board of Social Welfare has no present means by which to provide skilled nursing home care and intermediate care to qualified public assistance recipients other than through the licensed facilities of the plaintiffs' class and hospitals.
(Stipulation 22.)

27. That from January 1, 1968, until August 5, 1970, Kansas Administrative Regulations 30-5-27, Fees for Nursing Home Care, adopted by the State Board of Social Welfare provided that the fee for payment for the care of public assistance recipients in skilled nursing homes and establishments with registered nurses and licensed practical nurses on the

staff shall not exceed the rate paid by the County Welfare Department for similar care and services provided to recipients of other categories of assistance. (Plaintiffs' Exhibit 41.)

28. Under the provisions of said Regulation, the compensation for services provided by Plaintiffs' class to qualified recipients was fixed by the County Boards of Social Welfare of the various 105 Counties of Kansas. Said system did not assure the payment of charges directed by K.S.A. 39-708(x).

29. By State Director's letter L-706 of December 24, 1969 (Plaintiffs' Exhibits 36 and 37), the State Director of Social Welfare, acting pursuant to the directions of the State Board of Social Welfare, froze the payments to the Plaintiffs' class at the then various rates established by the 105 County Boards retroactive to December 1, 1969.
(Exhibits and Testimony of A. Bramble.)

30. In December, 1969, the State Board of Social Welfare directed the Department of Social Welfare to formulate and draft a program for adult care homes in the State of Kansas, pursuant to the terms of which a centralized payment system by the State Department would be inaugurated; a uniform system of payment would be established for adult care homes.

31. As a result of said direction, the staff of the State Department of Social Welfare drafted the Kansas State Department of Social Welfare program for adult care homes Manual (Plaintiffs' Exhibit 2).

32. A draft of the said Manual was submitted to the Defendant Secretary through its Social and Rehabilitation Service for Region XI, and reviewed with comments made thereon as appearing in the

letter from William W. McDermot to Dr. Robert C. Harder, Director, dated April 10, 1970, and appearing as an attachment to State Defendant's Exhibit F, and State Defendant's Exhibit L. (Exhibits and A. Bramble testimony.)

33. The State Board of Social Welfare, acting through its said Director, directed the County Boards of Social Welfare to put into effect said program. (State Defendant's Exhibit R.) That pursuant to the said letter dated June 12, 1970, the program was made effective as of July 1, 1970, for skilled nursing homes as defined in said Manual; and for intermediate care homes insofar as requiring them to provide the services and supplies described in said Manual for the per diem rate to be established by the County Boards of Social Welfare. The balance of the Manual provisions for the intermediate care program was to become effective July 1, 1971.

(Testimony of A. Bramble and exhibits.)

34. That there was no rule or regulation adopted prior to August 5, 1970, by the Kansas Department of Social Welfare under K.S.A. Chapter 77, Article 4, authorizing the standards, statements of policy and general orders of general applications contained in the said Manual (Plaintiffs' Exhibit 2). The Director of Social Welfare directed the County Boards to put the Manual, Plaintiffs' Exhibit 2, into effect on July 1, 1970. An amendment to K.A.R. 30-5-22 was adopted and promulgated by the State Board of Social Welfare on August 5, 1970. It was further amended effective January 1, 1971.

35. The said Manual purports to establish an allowable cost plus fixed fee formula for compensating

the adult care homes for the services provided to qualified recipients. It purports to require all of the adult care homes to sign a written contract under which the State Department of Social Welfare may avoid payment for services actually provided by the adult care home under their "utilization review procedures," and it purports to establish and mandate certain accounting procedures to be followed by adult care homes in their operation. The Manual further requires the plaintiffs to provide services, drugs and supplies to recipients of assistance which are not required by the State Board of Health to be provided to persons not receiving public assistance. It further purports to require the adult care homes to establish procedures for utilization review of the medical doctors designation of the care and treatment required by recipients. The said Manual further purports to regulate the role of the physician in directing the adult care homes services to be provided to recipients. Lastly, the said Manual purports to require the plaintiffs to accept and certify that they accept the payment made pursuant to the said Manual as payment in full for services provided to qualified recipients and further provides the said certification must be given under penalties of fraud.

(Stipulations 25, 27, 28, 29, 30; Plaintiffs' Exhibit 2; Testimony of A. Bramble.)

36. On June 24, 1969, in Volume 34, No. 120 of the Federal Register (Plaintiffs' Exhibit 7) the Defendant Secretary published Notice of Interim Policies Requirements adding to 45 CFR Section 249.33, Standards for Payment for Skilled Nursing Care (a) State Plan Requirements. This Section required a standard in addition to those established by the Kan-

sas Board of Health that a "licensed" nurse be on duty at all times during each "tour or duty" to entitle plaintiffs' class to payments under the Title XIX Plan. This regulation became final April 29, 1970 (Defendant Secretary's Exhibit D), and required graduate licensed practical nurses after July 1, 1970. (Stipulation 31.)

37. The Kansas Board of Health in establishing and maintaining standards for skilled nursing care under K.S.A. Chapter 39, Article 9, requires all patient residents to be at all times under the immediate supervision of a licensed registered nurse and requires additional licensed practical nurses to be employed to meet the needs for skilled nursing care for the patients. (K.A.R. 28-38-29 C. 5 b.) That these standards of the Kansas Board of Health constitute sufficient nursing and auxiliary personnel to provide adequate and properly supervised nursing services for such patients during all hours of each day and all days of each week in order to deliver skilled nursing care as the medical needs for these patients require under the commonly accepted meaning (and requirements) of medical doctors in Kansas who, in their orders designate care required to be "skilled nursing care."

(Testimony of Dr. D. V. Preheim; Regulations of Board of Health.)

38. In anticipation of the Interim Policy and Final Regulations on August 9, 1969, by State Directive L.-654 (State Defendant's Exhibit K-1) of the Kansas Department of Social Welfare, nursing homes licensed by the Kansas Board of Health to provide skilled nursing care under standards established and maintained by it were stated not to be sufficient for providing care to recipients of Title XIX benefits; that

recipients in Kansas homes should be reclassified in "all cases possible" to another category of assistance allowing purchase of care by cash grants. This reclassification in effect transferred the recipient from the Title XIX program under which he was entitled to and had been receiving skilled nursing care to the Title XVI program under which he would no longer be entitled to "skilled nursing care" as that term was now used under the said Secretary's regulation, and thereafter would receive "less than skilled nursing care" in intermediate care facilities, although in fact the medical needs of the recipient had not changed nor had the doctors orders for skilled nursing care been rescinded or altered, nor had the delivery of skilled nursing care by the nursing home changed. Furthermore, no standards for skilled nursing care had been changed in Kansas by the State Board of Health and the same standards continued in effect at all times subsequent for persons receiving skilled nursing care and paying for their own care. The only class of recipients where this classification could not be done was the one of "medical needy" (or those recipients who had more income or property resources than would be allowed for cash payment assistance under Title I, X, or XVI, but under the resource limit established for Title XIX "medical needy").

(Stipulation 25; State Exhibit K-1; Plaintiffs' Exhibit 19. The procedure was outlined in State Director's Letter L-638, Plaintiffs' Exhibit 19. Testimony of L. Stolz, Exhibits.)

39. Chapter III of the Manual purports to develop a plan for utilization reviews to be administered and directed by the adult care homes.

40. There is no Federal Statute, regulation or directive of the Secretary requiring the Department of

Social Welfare to require nursing homes to be responsible for determination of proper utilization of their services. The State plan for medical assistance must provide inspections by the State agency administering its plan. 42 U.S.C. 1396a(26).

(Stipulation 40.)

41. The provisions for utilization review contained in Chapter III of the Manual (Plaintiffs' Exhibit 2) are substantially the same as contained in the plan filed in this action by the Defendant State Department, September 11, 1970, with its Notice. (Stipulation 41.)

42. Provisions of the Secretary's Supplement D (Secretary's Exhibit H), requires in the State XIX plans that:

> "1. Fee structures will be established which are designed to enlist participation of a sufficient number of providers or services in the program so that eligible persons can receive the medical and services included in the plan at least to the extent these are available to the general population."

(Stipulation 41; Secretary's Exhibit H.)

43. This provision is contained in the XIX plan filed by the State and approved by the Secretary.

(Defendant State's Exhibit D, page 14 (D-5300).)

44. That 42 U.S.C. 1396a(a) (8) requires under Title XIX plans that the state plan shall:

> "(8) provide that all individuals wishing to make application for medical assistance under the plan shall have the opportunity to do so, and that such assistance shall be furnished with reasonable promptness to all eligible individuals."

The same requirement is made in the Statute for Title XVI in 42 U.S.C. 1382(a) (8).

45. That there is no Federal Statute limiting the amount of payment which the State must pay for Title XIX benefits provided to qualified recipients other than 42 U.S.C. Section 1396a(a) (30), which states that the state plan shall:

> "(30) provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments (including payments for any drugs provided under the plan) are not in excess of reasonable charges consistent with efficiency, economy, and quality of care."

(Stipulation 43.)

46. The Secretary issued Interim Policy Statement No. 6, June 7, 1969 (Plaintiffs' Exhibit 8) which implemented said Section (30), and provided that in the matter of Other Services (which include plaintiffs' class of nursing homes) that:

> "A determination shall be made of the reasonable charges for such services. The State in determining the upper limits of reasonable charges shall take into consideration the usual payment received by the providers (for furnishing similar services) from private patients, from intermediaries and carriers for Social Security Administration, and from other third-party insuring organizations for comparable services to regular policy holders and subscribers. In making

payments, the State shall take into consideration the prevailing payments in the locality for similar services."

This regulation was not inconsistent with the said Federal statute section (30) nor did it limit the provisions for payment contained in K.S.A. 39-708(x). (Stipulation 43.)

47. On January 25, 1969, SRS Program Regulation 40-4 (Plaintiffs' Exhibit 9) was issued by the Secretary and stated that the Interim Policy Statement No. 6 aforesaid would be codified in 45 C.F.R., Chapter II. Part 250.
(Stipulation 44.)

48. On January 25, 1969, there was published in the Code of Federal Regulations the said final regulations with comments. Comments on Other Services were stated:

"(b) Other Services—Comments were received concerning the policy statement requiring State to determine the upper limit or reasonable charges by determining the usual payments received by providers from private patients, from intermediaries and carriers for the Social Security Administration, and from other third-party insuring organizations. It was stated that payment should be on the basis of usual and customary charges. The policy in effect recognizes such a method to the extent that it is the basis for settlement recognized by other third-party payers. However, in the interest of enlisting the widest acceptance by medical providers of the title XIX program, policy has been changed to provide for

an upper limit for payment on the basis of customary charges which are reasonable."

The final regulation affecting the upper limits of payments to nursing homes was:

"Other Services

"The upper limit for payment for other services shall be the following:

* * * *

"(ii) Institutional Services

"Reasonable costs as defined by the standards and principles for computing reimbursement currently applicable to such institutions under Title XVIII of the Social Security Act."

(Plaintiffs' Exhibits 8 and 10; Testimony of Marvin Smith, CPA)

49. On March 13, 1969, the Secretary through Francis L. Land, Commissioner of the Social and Rehabilitation Service, advised by State Letter 1063 (Plaintiffs' Exhibit 11) that the aforesaid regulation was not intended to apply to reimbursement for skilled nursing home services.

50. On June 18, 1970, (Plaintiffs' Exhibit 12) the Secretary adopted a regulation relating to said upper limits as follows:

SS 250.30 Reasonable Charges.

* * * *

(b) ....
(3) ....

"(ii) Skilled nursing home services, outpatient hospital services, and clinic services. Customary

charges which are reasonable. Schedules of payments established by the State agency shall not exceed the combined payments received by providers (for furnishing comparable services under comparable circumstances) from the intermediaries or carriers under title XVIII and beneficiaries under title XVIII of the Social Security Act. Schedules will be acceptable if within the upper limits either on facility by facility basis or on the basis of average payments according to a reasonable classification of facilities based on levels of care."

(In case of provider which are not participating under title XVIII, a financial audit of the facilities to apply the title XVIII—A reimbursement principles is not required but the State shall establish schedules of charges which are consistent with the intent that upper limits do not exceed amounts paid under title XVIII-A for similar services.)

(Section 1102, 49 Stat. 647, 42 U.S.C. 1302.)

51. The Secretary, on June 10, 1970, adopted a regulation, 45 C.F.R. 234.130 (a) (7) implementing the Intermediate Care Facilities provisions of 42 U.S.C. 1320a and stated that a state plan shall:

"Provide for and describe methods of determining amounts of vendor payments to intermediate care facilities which systematically relate amounts of the payments to the kinds, levels, and quantities of services provided to the recipients by the institutions and to the cost of providing such services."

(Secretary's Exhibit A.)

That this regulation does not direct the states to limit payments to nursing homes (who provide the said benefits) to an "allowable cost" formula to be established by the State Department of Social Welfare nor does it constitute a limit by federal law to the payment of reasonable charges under K.S.A. 39-708(x).
(Exhibit A.)

52. That Chapters VI, VIII, and IX of the Kansas State Department of Social Welfare Program for Adult Care Homes Manual, Exhibit 2, attempts to define the reasonable, usual and customary charges for each of plaintiffs' homes for their services as they are provided under doctors orders to recipients qualified under the Title XIX and under Title XI Intermediate Care Facilities; it establishes an "allowable costs" rate to be determined under its formula; it states the dollar limits plaintiffs may pay for certain items and payments to plaintiffs shall be the "allowable cost" or a "top limit, whichever is less." (Chapter IX.)

53. Several federal laws and regulations refer to charges, payments and costs. They are described briefly, as follows:

(a) 42 U.S.C. 1395f (b). This section appears in Title XVIII, Medicare of the Federal Social Security Act and has no relation to either Title XIX or Title XVI or XI public assistance programs which provide for nursing home care to recipients qualified for benefits because of lack of resources, except to the extent noted in Finding 50 above. Title XVIII is an insurance program funded by all who contribute FICA payments and the coverage thereunder applies

to all such contributors and is not a public assistance program.

(b) 42 U.S.C. 1395x(u) and (v) (1). These sections also appear in the Title XVIII (Medicare) program and for the same reasons are not applicable to the public assistance programs in Title XIV and XVI.

(c) 42 U.S.C. 1396a(a) (30). This statute does provide the upper limit for payments shall not be in "excess of reasonable charges consistent with efficiency, economy, and quality of care." This section is compatible with K.S.A. 39-708(x) providing that the State Board of Social Welfare shall assure payment of reasonable charges and is not a limit on the payments provided therein but is consistent therewith.

(d) 45 C.F.R. 249.31 (Secretary's Exhibit C). This regulation is not a limit upon the amount of the reasonable charges which the State Department of Social Welfare must pay under K.S.A. 39-708(x). It purports to require providers to accept the payment by the State as payment in full.

(e) 45 C.F.R. 249.33 (Secretary's Exhibit D). This regulation has previously been found to deal with the Secretary's effort to use his general regulatory authority under 42 U.S.C. 1302 to define "organized nursing service" under 42 U.S.C. 1396a(a)(28), with the effect of eliminating the specific statutory directive appearing in 42 U.S.C. 1396a(a)(9) that the state authority "shall be responsible for establishing and maintaining standards" (which in this case is the State Board of Health). This section does not purport to limit the amount of payment required by K.S.A. 39-708(x).

(f) 45 C.F.R. 234.130(a)(7) (Secretary's Exhibit A). This section has previously been interpreted in Finding of Fact 51 and does not require an "allowable cost" formula for "reasonable charges" under K.S.A. 39-708(x).

There is no federal law otherwise limiting the provisions of K.S.A. 39-708(x).

54. At the time of the filing of this action, July 21, 1970, and prior thereto, Kansas regulation 30-5-27, *Fees for Nursing Home Care*, Plaintiffs' Exhibit 41, did not provide for the payment formula as outlined in the Manual, nor did any other statute or regulation published in the Kansas Administrative Regulations so provide.

(Stipulations 51 and 53, and Plaintiffs' Exhibit 41.)

55. On August 5, 1970, after the preliminary injunction against the Manual was entered, the Department of Social Welfare adopted by emergency resolution amended regulation 30-5-27, *Fees for Adult Care* Home Services, a copy of which is admitted as Plaintiffs' Exhibit 15. On January 1, 1971, said regulation was amended as a permanent regulation as provided in Plaintiffs' Exhibit 16.

56. After the passage of K.S.A. 39-708(x) in 1967, Kansas Administrative Regulation 30-5-27 (Plaintiffs' Exhibit 41) which became effective by amendment January 1, 1968, placed the responsibility for determining the amount of payment with the various 105 local Kansas County Welfare Boards with no standards stated for the payment. In practice, the local board set an allowable rate and this constituted the payment made for services provided to qualified

recipients under any of the programs. From time to time, as shown in the minutes of the State Board (State Defendant's Exhibits N-1, O-1, P-1, and Q-1), arbitrary across-the-board percentage increases were authorized and in some cases individual homes were allowed some increases over the local board-set rate. (State Department's Exhibits N-1, O-1, P-1, Q-1, and Plaintiffs' Exhibit 41; testimony of Sammon, Stolz, and Kieswetter.)

57. On December 24, 1969, the State Director, Robert C. Harder, defendant, arbitrarily froze all rates to adult care homes at the levels of December 1, 1969 (Plaintiffs' Exhibits 36 and 37); these levels were those generally set by local county boards prior to commencement of the County fiscal year, January 1, 1969. This freeze was in effect until July 1, 1970, at which time the Manual (Plaintiffs' Exhibit 2) was made effective by directive dated May 27, 1970, to all Plaintiffs' class and county board. (Defendant's Exhibit T and State Defendant's Exhibits R and S.) At that time the "allowable cost" formula was stated as the method for complying with K.S.A. 39-708(x). (Testimony of A. Bramble and exhibits.)

58. The payments made by persons being served by the adult care homes and paying for their services is in most instances greater than the payment which the Department of Social Welfare allows to be paid by a public assistance recipient from all of his resources and contributions made on his behalf by any of his family, friends, or other sources.

59. Under the administration of the adult care home purchase by the State, the State may deny the qualified recipient access to a home in his own county

by refusing to pay the charges requested by the local home operating in the local county and will purchase the service in a home outside the county at a rate in some cases less and in some cases more than the requested rate of the local home.

60. In the Manual, Exhibit 2, under Chapter IX, "Payment Rates to Adult Care Homes for Welfare Participants," there is established a different rate for proprietary homes and non-proprietary homes on a basis other than the services provided.

61. In the Manual, Exhibit 2, under Chapter IX, page 63, a different standard is provided for establishing the rate for payment for Kansas residents in homes outside the state than for homes within the State of Kansas.

62. The Secretary has adopted a regulation prohibiting plaintiffs from receiving any payments other than that paid by the State Department for the benefits provided to Title XIX recipients; he has not issued any such regulation relating to Title XVI recipients.

(Stipulations 59 & 61; Secretary's Exhibit C.)

63. By amendment made April 1, 1970, to its Title XIX state plan, State Exhibit D, the State Department of Social Welfare, under paragraph V, *Administration*, Sub-section H, *Fraud*, Sub-section 5 added a new section requiring the plaintiffs to certify that they have received no funds from any other sources for the payment of services provided to recipients; the following paragraph is required to be signed by each nursing home at the time they submit their claim for payment for services provided on Form DFA 389

appearing on page 66a of the Manual, Plaintiffs' Exhibit 2. Said statement is as follows:

a. "This is to certify that the foregoing information is true, accurate, and complete.

b. "I understand that payment and satisfaction of this claim will be from Federal and State funds, and that any false claims, statements, or documents or concealment of a material fact, may be prosecuted under applicable Federal or State laws."

That pending the adjudication of the issues in this action, the preliminary injunction in force in this case has allowed each of the providers to apply the payment made by the defendant State Board of Social Welfare on the charges made to each individual recipient for services, and that the decision whether the said payment is in full by said order awaits the adjudication of the issues in this case.

64. Exhibit 20 is a copy of notices to nursing home administrators dated April 26, 1967, advising of the position of the Welfare Department with respect to any home receiving payments in addition to payments from the Welfare Department for payment.

65. The Manual (Exhibit 2) contains rules, regulations, standards, statements of policy and general orders applicable to all Adult Care Homes in the State of every class, and it was not filed in compliance with K.S.A. 77-416 nor was notice given to all parties in interest known to the Board as is required by K.S.A. 77-421.

66. During fiscal year 1972, under the existing statutes and regulations now in force, the State Board

of Social Welfare has made no provision for increases for their adult care home services because of budget cuts.

67. The Board of Social Welfare has established a top limit of $11.00 per day for payment of Title XIX skilled nursing care. Under the adult care home program, a top limit or lid of $11.00 per day was placed for administrative and financial reasons upon the allowable cost formula developed by the Board. At the time of the institution of the manual, in no county in Kansas was payment as high as $11.00 per day. In Sedgwick County, the rate was $321.00 per month (not varying according to the days of the month), and in Shawnee County, the rate was $315.00 per month (also not varying) for federally qualified skilled nursing home care. Under the provision of the manual, then, it was possible to obtain as much as $341.00 per month if allowable costs and profits justified it. (Testimony of Mr. Bramble and Mr. Stevenson.)

68. Prior to May 12, 1967, the effective date of K.S.A. 39-708(x), there was no statutory means in Kansas for payment of nursing homes for services rendered on behalf of welfare recipients except under the provisions of Medical Assistance for the Aged [K.S.A. 39-708(a) and (s)]. That system contemplated negotiation by each of the 105 County Boards of Social Welfare with each nursing home providing service to a welfare recipient whose case was being administered by a particular county department of social welfare, the negotiation to resolve the amount of payment which would be made. At one time, payments were made to the welfare recipient; subsequently, payments were made directly to the adult

care home. (See K.A.R. 30-5-17D.) These later are designated "vendor payments." (Testimony of Mr. Kieswetter.)

These negotiations were to be terminated on July 1, 1970 for federally qualified skilled nursing homes. For homes providing a lesser degree of care, these rate negotiations between each home and each board would terminate according to the calendar for implementation for the nursing home program.

69. From May 24, 1967 to June 30, 1970, the State Board of Social Welfare, in discharging its responsibility under K.S.A. 39-708(x), continued paying charges at rates negotiated by county boards of social welfare, not only for medical services but also for institutional or care home services. (Testimony of Mr. Kieswetter and Mr. Bramble.) From July 1, 1970 to July 21, 1970, the State Board of Social Welfare undertook to discharge its statutory responsibility as to federally qualified skilled nursing homes by operating the adult care home program described in the Manual.

70. There is no written evidence that plaintiffs have "contracts" with any of the 105 County Boards of Social Welfare from May 24, 1967 to the present. There is no evidence that under the program, prior or subsequent to July 1, 1970, the services of plaintiffs' class are less available to eligible public assistance recipients as they are to the general population.

71. The Kansas medical assistance program consists of several distinct programs for different kinds of medical providers. Medical doctors, being licensed practitioners, receive their usual and customary charges which are reasonable, because those charges

are limited by the 75th percentile of the charges sent in by all doctors. This system, which is similar to the Title XVIII system, is operated through the Fiscal Intermediary and is applicable also to doctors of osteopathy. Druggists have a figure based on cost plus a professional fee. (Testimony of Mr. Kieswetter.) All medical providers are expected to sign a provider agreement. (Testimony of Mr. Kieswetter; K.A.R. 30-2-3.) All programs for medical providers were begun and in operation prior to July 1, 1970. From January, 1967 to June, 1970, the State Board of Social Welfare was attempting to develop a program based on cost because it interpreted the word "reasonable" to require the Board to determine what charges were reasonable. (See Minutes of February 23, 1967, as to "costs." State Defendant's Exhibit N-1.)

72. The State Board of Social Welfare construes K.S.A. 39-708(x), 1970 Supp., to apply only to providers of *medical* service (that is, as it is limited by Title XIX of the Social Security Act) so that the first sentence of K.S.A. 39-708(x) does not apply to *any* adult care homes. The second sentence applies only to Federally Qualified Skilled Nursing Homes and does not apply to Intermediate Care Facilities. Hence, federally qualified skilled nursing homes, having provided that level of service, would receive "reasonable, usual and customary charges." Intermediate care facilities would not: in no case, would operators of federally qualified skilled nursing homes receive "*their* reasonable, usual and customary charges" (emphasis added), because in no case would they be "licensed practitioners in the scope of their practice." Payment to homes not providing federally qualified skilled nursing care would be for care under Title

XVI and Tile XI, and K.S.A. 39-708(a) and (s); but not for treatment under K.S.A. 39-708(x) and Title XIX.

73. The words "reasonable charges consistent with efficiency, economy and quality of care" used by the Congress in 42 U.S.C. §1396a(a) (30) are not words of art and are subject to administrative interpretation and, whatever might be said about "reasonable charges," the statutory language just quoted is novel and free of precedent and consequently particularly susceptible to considerable latitude of interpretation by the Secretary and the State Department of Social Welfare.

74. Much leeway is allowed to the State and for those providers of Title XIX services not participating under Title XVIII, the Title XVIII cost finding procedure and financial audits are not required. The State need only establish payment schedules which are consistent with the intent that Title XVIII payment levels for the same quality and duration of care not be exceeded. The methodology in the challenged manual is a reasonable effort by the State and a reasonable exercise of its authority to accomplish that purpose. The promulgation of and the context of 45 CFR 250.30(b) (3) (ii) "was well within his (the Secretary's) discretion and did not deny the plaintiff due process of law. 45 CFR §234.130(a) (7) is designed to recognize that intermediate care facilities vary as to the levels of care they provide and while some facilities may provide a little more than room and board, others may deliver a qualitative level of care which is only slightly less than a federally qualified skilled nursing home. The regulation requires

that a state's schedule of payments to intermediate care facilities take these qualitative differences into account. 45 CFR §134.130(a) (7) does not require that the State's payments equate directly to the costs of the facility and neither Title XVI nor 42 U.S.C. §1320a contain provisions such as those found in Title XIX setting upper limits on payments or, as in the case of in-patient hospital services, specific levels of payment.

75. The legislative history of the phrase a "single state agency" and as used in the Social Security Act refers to state as opposed to local county authorities with whom the Secretary may deal in the administration of states' plans for public assistance. This phrase goes back to 1935 whereas the phrase 'standard setting authority or authorities" refers to the establishment or designation of a state authority or authorities which shall be responsible for establishing and maintaining standards of such institutions. The Congressional concern leading to the amendment providing for a "standard setting authority or authorities" reflects concern by Congress over "tragic instances of failure to maintain adequate standards of care and adequate protection against hazards threatening the health and safety of residents of institutions . . . persons who live in institutions, including nursing and convalescent homes, should be assured a reasonable standard of care and be protected against fire hazards, unsanitary conditions and overcrowding." House Ways and Means Committee Report (1953). The distinction is clear, the single state agency concept used in the statute means the agency who will receive and disburse federal funds whereas the standard setting authority or authorities refers to that

state authority or authorities who will protect against hazards threatening the health and safety of residents of institutions. 45 CFR §234.130 (d) (3) and 45 §1249.10 (b) (4) (i) are reasonable. 45 CFR §234.130 (d) (3) merely repeats the statutory definition in 42 U.S.C. §1320a(e). The regulations simply recognize the intent of Congress which contemplated that distinct or identifiable facilities would provide specific levels of care and that the very purpose of the enactment of the intermediate care facility provision of Title XVI was to avoid the placement of individuals in skilled nursing homes who do not need skilled nursing home care. S. Rep. No. 744, 90th Cong., 1st Sess., 98, 188-189 (1967).

76. 45 CFR §249.11 repeats virtually verbatim the language of the statute 42 U.S.C. §1396a(a)(23) and adds language to it from the legislative history about the State's authority to determine the fees paid under the plan and to set reasonable standards for provided participation. S. Rep. No. 744, 90th Cong., 1st Sess., 183 (1967). Thus, in order for providers to participate in the program they must accept the agency's fee schedule and other reasonable conditions. The freedom of choice provisions in 42 U.S.C. §1396a(a)(23) are not diminished or imposed upon by the additional requirements imposed by subsections (26) (28) and (3) of the same statute. The recipients' freedom of choice relates only to those providers who agree to participate in the State's program.

THE ISSUES OF LAW

The Court notes that a number of issues of law were proposed with the pretrial order. While the

foregoing statement substantially covers the pertinent issues, they will be considered in the order submitted.

I.

The Department of Social Welfare does have authority to establish the Welfare Manual Program for Adult Care Homes.

A. The formula for payments established in the Manual fulfills the requirements of K.S.A. 39-708(x), as amended on and after July 1, 1971, but not before that date.

(1) 42 USC § 1396(a)(30) does supercede K.S.A. 39-708(x) to the extent the federal statutes become applicable.

(a) The federal statute (30) does not require the formula established in the Manual (Exhibit 2); neither does it forbid the use of it, but leaves to the State Board the development of a formula for calculating reasonable charges limited to the funds available to the State to meet such payments.

(2) Federal laws and regulations do not require the use of the formulas provided in applying the upper limits of 42 U.S.C. 1396a(a), nor do they forbid such use.

(a) The Secretary's regulation is not an invalid interpretation of Congressional intent expressed in 42 U.S.C. 1396a(a)(30).

(b) The regulation does not require the formula established in the Manual, neither does it forbid such procedure.

(3) The formula for payments contained in the Manual (Exhibit 2) are inconsistent with Section D-5320-1 of Supplement D (Secretary's Exhibit H) and with Section IV C.

B. The standards for services to be provided in the Manual does not violate the authority of the State Board of Health but are not consistent with provisions in State Title XIX Plan (State's Exhibit D, Secretary's Exhibit K).

(1) 45 CFR 249.33, defining "organized nursing services" in sub-section (b)(1)(ii) is not inconsistent with the Congressional intent manifested in 42 U.S.C. 1396a(a)(9) and does not exceed the intent of Congress expressed in 42 U.S.C. 1396a(a)(28)B. The requirement that an organized nursing service for patients under the direction of a full time employed registered nurse makes insufficient "skilled nursing care" commonly performed by or under the supervision of a registered nurse since it lacks the condition that the registered nurse be employed "full time."

(2) The requirement that a "distinct part" of a nursing home be designated as Intermediate Care Facility is not prohibited within Congressional intent found in 42 U.S.C. 1320a(e) but appears to be consistent with it.

C. Provisions of the Manual relating to utilization review does not attempt to assert impermissable authority contrary to standards and requirements for services defined by provisions of the K.S.A. Chapter 39, Article 9, but were, prior to July 1, 1971, contrary to K.S.A. 39-308(x).

D. The provisions of the Manual providing for suspension of payments is not inconsistent with KSA Chapter 39, Article 9, nor with K.S.A. 39-708(x), before or after Amendment.

II.

The regulations adopted on August 6, 1970 and permanently on January 1, 1971 are a valid exercise of authority by the Board of Social Welfare.

A. These regulations were not consistent with the provisions of the Kansas State Title XIX Plan (Secretary's Exhibit K) on July 1, 1970 nor as subsequently changed.

B. The provisions of the regulation subjecting services provided by plaintiffs' class to review and decision constitute a valid exercise of authority by the Board of Welfare in any event.

III.

Regulations adopted January 1, 1968 (Exhibit 41), by emergency procedure August 5, 1970 (Exhibit 15) and permanently on January 1, 1971 were contrary to provision of K.S.A. 39-708(x) at the time of adoption.

A. The provisions of CFR 250.30 do limit the Board in action required under K.S.A. 39-708(x) before and after amendment.

IV.

The Kansas State Plan Relating to Intermediate Care Facilities dated April 17, 1970 does establish and maintain standards for adult home services which are not in conformity with licensing authority of the

State Board of Health but only the State by action of the Attorney General may question the right of the Welfare Board to act as it did in establishing its plan. Cf. International Harvester Co. vs. Kansas City, 308 Fd 2 35, Tenth Circuit.

V.

The Department of Social Welfare may prohibit homes from receiving payment from supplemental sources.

A. The Department may, if it so directs, deduct payments as a resource of the recipient in computing its payments to the Adult Care Home for Intermediate or Boarding Home Care.

B. 45 CFR 249.31 is a valid condition for the approval of a State plan or for an amendment to an existing plan for medical assistance under Title XIX.

VI.

Plaintiffs' class do have contracts with the Board of Social Welfare. They are unilateral in nature. [Restatement, Law of Contracts Sec. 12(c)]. Plaintiffs are not required by law or license to accept recipients qualified under any Government or State program, but when they do so, then they are entitled to the payments authorized by law to be made to them.

A. A qualified recipient has the right under the Federal Social Security Act to require that services to him be made available as to others of equal need and within the financial and budgetary limitations necessarily present.

VII.

Compliance with provisions of KSA 75-3306 was not intended to be a condition precedent to the plaintiffs bringing this kind of an action.

VIII.

An administrative proceeding under 42 U.S.C. 1396c was not intended to apply to the situation under the Court's consideration here and plaintiffs' class was not required to initiate proceedings under its provisions.

IX.

The filed Kansas State Title XIX Plan as it existed July 21, 1970, and as amended August 18, 1970, and again December 1, 1970, as it relates to adult care homes providing skilled nursing care did not on the dates mentioned comply with K.S.A. 39-708(x).

X.

The manual was adopted by the Board pursuant to requirements of HEW, but it was not made effective by compliance with the requirements of Chapter 77, Kansas Statutes Annotated.

COMMENT

The problems presented here grow out of an effort on the part of a benevolent government to relieve the insecurity imposed on the multitude of our population who, because of old age, infirmities, or poverty cannot adequately provide care for themselves.

The burden of providing care of a quality required for many who are afflicted with disabling ailments along with all the other categories of assistance has been enhanced by the rapid inflationary development

and costs to such an extent that the tax revenues no longer meet the necessities once contemplated by the generous provisions of law and retrenchment is the order of the day.

The operation of the Social Security Act has become so enormous and so complicated that inconsistencies and conflicting statutes, regulations and directives are bound to exist.

Court should exercise great restraint in dealing with the extraordinary and unusual situations that have been created because of what appears in some instances to be uncoordinated efforts of different agencies and bureaus of government to provide facilities to carry out the purposes of the Social Security Act.

That conflicting rules exist must be acknowledged. That they must be harmonized, if possible, seems essential if the program is to succeed within the finances available and the budgetary limitations imposed by reason of legislative appropriations.

It is for these reasons that great latitude must be afforded those agencies which are charged with the responsibility of making the programs workable to the extent funds are made available to them. The legislative intent must be inferred from the appropriations it makes available to carry out what otherwise appears to be mandatory provisions directing payment for services provided by vendors.

From the foregoing Facts, the Court makes the following:

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the subject matter and of all parties to the action.

2. The adoption by the Congress of the United States of all the federal statutes referred to in the trial of this action, pleadings, briefs and argument of counsel were a constitutional exercise of its powers.

3. The authority delegated by the Congress to the Secretary was lawful and did not exceed the constitutionally delegated powers of Congress to do so.

4. That the rules and regulations promulgated by the Secretary and codified in the Code of Federal Regulations referred to in the pleadings, briefs of the parties, the evidence and the arguments of counsel were reasonable and within the Secretary's lawfully delegated authority.

5. No United States constitutional or federally created statutory right of the plaintiffs have been abridged or encumbered and plaintiffs have wholly failed to prove any grounds or basis upon which this Court may grant plaintiffs any relief as against the Secretary.

6. There is no evidence that plaintiffs are *de facto* custodians of the rights and remedies of the recipients of medical assistance under Title XIX of the Social Security Act and under K.S.A. 39-708(x).

There is no evidence that plaintiffs are the custodians of the rights and remedies of the recipients of institutional and intermediate care assistance under Titles XI and XVI of the Social Security Act and under K.S.A. 39-708(a) and 39-708(s).

There is no evidence that the legislature of the State of Kansas intended those providing non-medical care should receive payment under the standard set out in K.S.A. 39-708(x).

7. That under K.S.A. 39-708(x), prior to July 1, 1971, Plaintiffs and all members of Plaintiffs' class, providing nursing home services under Title XIX of the Social Security Act, were entitled to receive for said services from Defendant Department of Social Welfare reasonable, usual and customary charges.

8. That the amendment to K.S.A. 39-708(x) in House Bill 1629 enacted by the 1971 Session of the Kansas Legislature, effective July 1, 1971, provides that Plaintiffs and all members of Plaintiffs' class providing services as above set forth are entitled to "reasonable charges" therefor.

9. The above and foregoing provisions are subject only to the following limitations:

> " . . . *Provided however*, That if such payments are otherwise limited by federal law, such payments shall be as near the reasonable, usual and customary charges as may be permitted by federal law."

10. There is no provision in the Social Security Act, or any other provision of Federal law or regulation which conflicts with or limits the requirements imposed on the Department of Social Welfare by K.S.A. 39-708(x). That 45 CFR 234.130(a) (7) does not require states to adopt an "allowable cost" formula for payments of services provided by Plaintiffs for recipients of Title XVI benefits.

11. 42 USC 1396a (a) (30), which requires states participating in the Title XIX program to provide methods of payment to providers of services thereunder, including nursing homes, assuring that said payments "are not in excess of reasonable charges

consistent with efficiency, economy, and quality of care," does not conflict with or limit the requirements imposed on the Department of Social Welfare by K.S.A. 39-708(x).

12. The provisions of Title XVI, 42 USC 1382 (a) (9), and Title XIX, 42 USC 1396a(a) (9) require a state to designate a standard setting agency "which shall be responsible for establishing and maintaining standards for . . . . institutions" participating in the programs established by said Titles; that the Kansas State Board of Health has been designated as the standard setting agency in both said programs.

13. Neither Title XVI (42 U.S.C. 1381 *et seq.*) nor Title XIX (42 U.S.C. 1396a *et seq.*) contains any provisions prohibiting nursing homes from receiving supplemental payments from sources other than the states, for the services provided, subject to limitations set forth in 42 U.S.C. 1382(a) (14).

14. The State Board of Social Welfare Regulation K.A.R. 30-5-27 *Fees for Nursing Home Care* adopted January 1, 1968, (Plaintiffs' Exhibit 41) is not consistent with and is at variance with K.S.A. 39-708(x) and by reason thereof was invalid prior to July 1, 1971.

15. The State Board of Social Welfare Regulation amending K.A.R. 30-5-27 adopted August 5, 1970, (Plaintiffs' Exhibit 15) is not consistent with and is at variance with K.S.A. 39-708(x) and by reason thereof was invalid prior to July 1, 1971.

16. The State Board of Social Welfare Regulation amending K.A.R. 30-5-27 adopted January 1, 1971, (Plaintiffs' Exhibit 16) is not consistent with and

is at variance with K.S.A. 39-708(x) and by reason thereof was invalid prior to July 1, 1971.

17. A qualified recipient under the plans approved by the Secretary and under K.S.A. Chapter 39, Article 7, have the right to receive the benefits stated in such plans to require the State Department of Social Welfare to provide the same to the same extent such benefits are provided to others of equal need.

18. That K.S.A. 75-3306 is not applicable to this action as creating a condition precedent to Plaintiffs' cause of action for the reasons that said statute applies only to an appeal from an action of a Department employee and does not provide (as does K.S.A. Chapter 77, Article 4) for the determination of the action of the Board of Social Welfare; and further, on the record it appears that Plaintiffs have exhausted in fact all efforts for remedies by the Board of Social Welfare.

19. The proceeding under 42 USC 1396c (a conformity hearing) is not a condition precedent to Plaintiff's cause of action because that provision for a hearing is initiated only by the Secretary's refusal to approve a plan and the State's request for a hearing neither of which have occurred in this action.

20. The only contract plaintiffs have with any agency of the State is one which is unilateral in nature and which is enforceable only to the extent plaintiffs provide service to welfare recipients under applicable provisions of statutory law or regulations not in conflict with the Constitution or the statutes authorizing them.

21. The manual, (Exhibit 2) which contains rules, regulations, standards, statements of policy and gen-

eral orders applicable to all adult care homes of every classification in the State affects private rights and interests and is directed to a group which does constitute a general class and must therefor be filed in accordance with K.S.A. 77-416 with notice required by K.S.A. 77-421.

22. Plaintiffs are entitled to recover the reasonable, usual and customary charges for medical assistance which they have provided under provisions of K.S.A. 1970 Supp. 39-708(x) from the date it was originally enacted to July 1, 1971, from defendant, The Kansas State Board of Social Welfare, reduced by payments heretofore received.

Counsel are directed to prepare and submit a form of Judgment to be entered on these Findings and Conclusions.

Dated at Topeka, Kansas, this 4th day of August, 1971.

/s/ GEORGE TEMPLAR
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil Action No. T-4779
SENECA NURSING HOME, *et al*,
Plaintiffs,
VS.
THE KANSAS STATE BOARD OF
SOCIAL WELFARE, *et al*,
Defendants.

DECLARATORY JUDGMENT

Filed Aug. 10, 1971

On this 28th day of June, 1971, pursuant to direction of this Court on June 7, 1971, the above civil action comes before the Court for trial to the Court on the issues joined in the Pre-Trial Order filed herein June 25, 1971; there appears for the Plaintiffs their attorneys of record, T. Richard Liebert, Jack A. Quinlan, and William A. Geoghegan; for the State Defendant there appears their attorney of record J. J. B. Wigglesworth; and for the Defendant Secre-

tary there appears his attorney of record, Edward H. Funston.

The parties announce that they are ready for trial and the Plaintiffs present their witnesses and evidence.

Whereupon, the hour of 5:00 o'clock P.M. arriving, the Court recesses the trial until 9:30 A.M., June 29, 1971; and at said time and date the Plaintiffs continue the presentation of their evidence until the hour of 5:00 o'clock P.M., at which time the Plaintiffs complete the presentation of their evidence and rest and thereafter the Court recesses the trial until 9:30 A.M., June 30, 1971; and at said time and date the State Defendants and the Defendant Secretary orally move to dismiss and the Court, after hearing argument thereon, overrules the said motions.

Whereupon, the State Defendants present their witnesses and evidence and the hour of 5:00 o'clock P.M. arriving, the Court recesses the trial until 10:00 o'clock A.M., July 2, 1971; and at said time and date the trial continues with the presentation of the State Defendants' evidence and the hour of 5:00 o'clock P.M. arriving, the Court recesses the trial until 9:30 A.M., July 6, 1971; and at said time and date the trial continues and the State Defendants continue the presentation of their evidence and at the hour of 5:00 o'clock P.M., complete the presentation of their evidence and rest, and the hour of 5:00 o'clock P.M. having arrived, the trial is recessed until 9:30 A.M., July 7, 1971; and at said time and date, the trial continues with the presentation of the Defendant Secretary's witnesses and evidence and the hour of 12:00 o'clock noon having arrived, the Defendant Secretary completes the presentation of his evidence and rests;

and there being no further evidence offered by the parties, the presentation of evidence is completed.

Whereupon, the Court directs the parties to submit their respective proposed findings of fact and conclusions of law at 10:00 o'clock A.M., July 8, 1971, at which time the Court will hear arguments of the respective counsel thereon; and at said time and date the parties file their respective proposed findings pursuant to directions of the Court and their arguments in support thereof.

Whereupon, the Court takes the matter under advisement.

NOW ON THIS 4th day of August, 1971, the Court, after considering the Pre-Trial Order, the Stipulations of the parties contained therein, the order of the Court made on May 28, 1971, and all the evidence introduced by the parties, files its Findings of Fact and Conclusions of Law, all of which are made a part of this Order by reference as fully as though set out herein.

IT IS, THEREFORE, BY THE COURT CONSIDERED, ORDERED, ADJUDGED AND DECREED That Plaintiffs' class provide medical assistance as the same is defined in K.S.A. 39-702; and that Plaintiffs' class is entitled to recover the reasonable, usual and customary charges for such assistance under the provisions of K.S.A. 1970 Supp. 39-708(x) from the date it was originally enacted to July 1, 1971, from Defendant, the Kansas State Board of Social Welfare, reduced by payments heretofore received.

IT IS FURTHER CONSIDERED, ORDERED,

ADJUDGED AND DECREED That the *Kansas State Department of Social Welfare Program for Adult Care Homes Manual*, Plaintiffs' Exhibit 2, contains rules, regulations, standards, statements of policy and general orders applicable to all adult care homes of every classification; all county boards of social welfare; and all of that class of recipients served by Plaintiffs' class. The said Manual affects private rights and interests of these groups which constitute a general class and must be adopted and promulgated pursuant to K.S.A. 77-416 and 421, and therefore, is of no force and effect. Furthermore, said Manual is inconsistent with and repugnant to K.S.A. 1970 Supp. 39-708(x), as that section existed prior to July 1, 1971.

IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED AND DECREED That Plaintiffs may now make application under its fourth cause of action for relief against the Defendant State Board of Social Welfare after having first given reasonable notice to the Defendant State Board of Social Welfare and subject to pretrial consideration and conference, and may proceed to trial based upon the Judgment herein entered. That the costs herein be assessed against the Defendant State Board of Social Welfare.

/s/ GEORGE TEMPLAR
Judge of the United States District Court

PUBLISH

No. 72-1242

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

January 1974 Term

SENECA NURSING HOME, *et al*,
Plaintiffs-Appellees,
v.
THE KANSAS STATE BOARD OF SOCIAL WELFARE, *et al*,
Defendants-Appellants.

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
(D.C. No. T-4779)**

Filed January 18, 1974

This case involves a dispute between a group of licensed nursing homes in Kansas and the State Board of Social Welfare (the Board) over payment for nursing services provided under state and federal welfare programs. The nursing homes seek to recover unspecified sums claimed for "reasonable, usual and customary charges" which they say they are entitled to by law and by contract and are unlawfully denied by a pay structure, essentially based on a formula of allowable cost plus a limited profit, that the Board claims is proper under controlling law and regulations, there being no contract. The trial court upheld the principal contention of the plaintiffs for the period prior to July 1, 1971, and we agree.

The court allowed the case to be maintained as a class action by named plaintiffs, who are appellees

here, on behalf of themselves and the class of nursing homes similarly situated. Under licenses issued by the Kansas State Board of Health (the Board of Health), some plaintiffs are homes providing "skilled nursing care" as "nursing homes" and others are homes providing "simple nursing care" as "personal care homes," as defined under Kansas law.

Under Kansas law, K.S.A. Chap. 39, Art. 7, the State Board of Social Welfare, defendant-appellant here, is charged with developing state plans to provide care and assistance to chronically ill and infirm aged persons qualified for assistance under the federal Social Security law and with determining state policy and supervising such programs under a plan not inconsistent with federal or state law.

This action was commenced in the state court and removed subsequently by the defendants, who were all then state officers and agencies, to the federal district court on the basis that the case involved the construction and interpretation of federal law and regulations.[1] After trial the district court made detailed findings and conclusions. A declaratory judgment was entered sustaining the plaintiffs' main contention and deciding that they were entitled to payment on the standard of "reasonable, usual and customary charges" for the period before amendment of the Kansas Statutes in July, 1971. The damage claims for exact amounts of recovery were reserved. The state defendants appealed from the declaratory judgment in favor of the plaintiffs and no cross-appeal is being prosecuted by the plaintiffs on findings favorable to the defendants.

1. In the federal court the Secretary of the Department of Health, Education and Welfare was made an additional defendant. No relief was granted against him and he is not participating in this appeal.

On this appeal the following questions are presented:

(1) Whether the action could properly have been brought in the federal court as one arising under federal law within 28 U.S.C.A. § 1331 and was thereby properly removed;[2] and

(2) whether the plaintiffs were entitled to payment for services under K.S.A. 39-708(x) on the standard of "reasonable, usual and customary" charges rather than on the cost plus basis provided by a manual of the State Department of Social Welfare and regulations of the Board; and

(3) whether there was a contractual basis for suit by plaintiffs entitling them to maintain the action against the state agencies; and

(4) whether the manual was required to be promulgated in accordance with the notice, hearing and other procedural requirements of K.S.A. 77-415, et seq., which was not done; and

(5) whether the finding that all members of the plaintiffs' class were "medical providers" within the meaning of K.S.A. 39-708(x) was proper.

The trial court's opinion made a thorough statement of all the background facts, numerous conten-

2. The parties have raised no federal jurisdictional questions on appeal. However this Court on its own motion at argument requested supplemental briefs as to whether the action was properly removable as one arising under federal law within the meaning of 28 U.S.C.A. § 1331. That question and related subsidiary ones are considered below.

tions made and its rulings. We limit our statement to the facts necessary to treat the principal issues the appeal presents. These facts will be detailed in discussing the issues, to which we now turn.

(1) *Federal court jurisdiction.*

As stated above, this Court has raised the question of subject matter jurisdiction on its own motion. We were concerned whether the action was one arising under federal law within the meaning of 28 U.S.C.A. § 1331 and therefore properly removable under 28 U.S.C.A. § 1441. Supplemental briefs were requested and have been filed by the parties. They both take the position that subject matter jurisdiction was proper in the trial court for the reason that the action is one arising under the Constitution and laws of the United States.

We will focus on the amended and supplemental complaint filed in the federal court after removal since the removing defendants went to trial on that pleading without objecting to federal jurisdiction or the filing of the amendment. See *Craig v. Champlin Petroleum Co.*, 421 F.2d 236, 239 (10th Cir.); cf. *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699, 705-706.[3] We must determine whether from the face of that complaint it appears that a right or immunity created by the Constitution or laws of the United States is an element, and an essential one, of the plaintiffs' cause of action. See *Pan American Petroleum Corp. v. Superior Court*, 366 U.S. 656,

3. While the state defendants did not challenge the jurisdiction on the basis that a federal tribunal as such lacked power to hear the suit, they have maintained that because of the lack of a contract with the plaintiffs, no suit could be maintained against them at all in view of K.S.A. 39-708(k).

663; *Gully v. First National Bank*, 299 U.S. 109, 112-113. And it is no substitute that the defendant was almost certain to raise a federal defense. *Pan American Petroleum Corp. v. Superior Court, supra* at 663.

The amended and supplemental complaint alleges several claims as deriving from the laws and Constitution of the United States.[4] It is unnecessary to

4. Among other things in essence these allegations were:

A. Qualified recipients are being denied a right allegedly guaranteed by the federal Social Security Act, to receive care at the nursing home of their choice.

B. The Kansas plan is in violation of federal law because it does not make adult home care "available to some" on the same basis it is available to the general public.

C. The provisions of the new "Nursing Home Manual" impair obligations of long term contracts of the nursing homes to provide nursing care to persons qualified to receive such care and that the changes violated rights protected by Article I, § 10 of the United States Constitution.

D. The prohibition against supplemental payments constitutes a taking of property without due process of law and such provision does not comply with the five basic priorities of Title XIX of the Social Security Act. 42 U.S.C.A. § 1396a (a) (13).

E. Plaintiffs were denied equal protection of the laws by the manual because it required them to provide special personnel, equipment, and services to recipients for less than the reasonable, usual and customary charge.

F. The Kansas Administrative Regulation 30-5-27 is in conflict with 42 U.S.C.A. § 1396a(a) (30) [§ 1902(a) (30) of the federal Social Security Act].

G. Kansas Regulation 30-5-27 is in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution because it requires partiality in the amount of payments.

H. The system administered by the defendants is contrary to the federal Social Security Act because no amended plan for providing care in "intermediate care facilities" has been filed and approved as required by 42 U.S.C.A. § 1320a.

analyze all the various claims. We are satisfied that claims A and F as stated in the margin are sufficient to support federal jurisdiction as substantial claims arising under federal law.

Claim A averred that qualified recipients are being denied a right allegedly guaranteed by the federal Social Security Act to receive care at the nursing home of their choice. See 42 U.S.C.A. § 1396a(a)(23). And claim F stated that Kansas Administrative Regulation 30-5-27 is in conflict with 42 U.S.C.A. § 1396a(a)(30) which stipulates essentially that state plans must provide methods and procedures relating to utilization and the payment for care and services as may be necessary to safeguard against unnecessary utilization and to assure that payments are not in excess of reasonable charges consistent with efficiency, economy and quality of care. We express no view on the merits of such claims of conflict between the Kansas manual and regulations and the federal statutes beyond saying that they are not so wholly insubstantial that federal jurisdiction does not exist. See *Harmony Nursing Home, Inc. v. Anderson*, 341 F. Supp. 957 (D. Minn.). We conclude that the claims made could not be dismissed as obviously without merit and defective as a jurisdictional base. See *Levering & G. Co. v. Morrin*, 289 U.S. 103, 105; see also *Goosby v. Osser*, 409 U.S. 512, 518. And the plaintiffs as recipients of payments would have standing for themselves and for the interest of those served by them to assert these claims in view of the relationship to the indigents cared for. See *Harmony Nursing Home, Inc. v. Anderson, supra* at 959; see also *Sierra Club v. Morton*, 405 U.S. 727, 737; *Barrows v. Jackson*, 346 U.S. 249, 256-258.

While not granting relief to the plaintiffs on federal grounds the trial court sustained the plaintiffs' principal position under state law. In so doing the court exercised pendent jurisdiction over these claims. When the declaratory judgment was entered on state grounds the federal claims had not been dismissed or abandoned. In these circumstances and in view of the complexity of the intertwined federal issues, the exercise of pendent jurisdiction was within the reasonable discretion of the trial court. See *United Mine Workers v. Gibbs*, 383 U.S. 715.

(2) The validity of the Board's cost plus formula for payment.

The district court held that the formula of the Board based on allowable cost plus a limited profit was repugnant to K.S.A. 39-708(x), as the statute existed until July 1, 1971. This holding was expressed by declaring that such provisions of the manual effective July 1, 1970, were unlawful in view of the statute.[5] The holding also was expressed by declaring that the regulation of the Board, K.A.R. 30-5-27, which likewise adopted the formula, was contrary to the statute.[6]

We should refer briefly to the federal and state statutory provisions involved as a background for our discussion.

The federal Social Security Act consists of several

5. As discussed in detail below the manual was also held invalid for lack of compliance with procedural requirements for its promulgation.

6. The trial court also held this regulation invalid as to earlier provisions allowing payment at rates negotiated by the County Departments of Social Welfare. For reasons that follow we also agree with this holding under K.S.A. 39-708(x).

enactments under which the federal government makes funds available to the states for the care of various categories of needy individuals. The sections of the federal statute with which we are concerned are Title XVI (Grants to the States for Aid to the Aged, Blind or Disabled or for Such Aid and Medical Assistance for the Aged, 42 U.S.C.A. §§ 1381, et seq.) and Title XIX (Medicaid) (Grants to States for Medical Assistance Programs, 42 U.S.C.A. §§ 1396, et seq.).

Of particular relevance here are those sections of the federal statute providing for grants to states for assistance to needy individuals for institutional care under Title XVI in "intermediate care facilities," 42 U.S.C.A. §§ 1320a and 1385(b). We are also concerned with Title XIX provisions dealing with "skilled nursing homes," 42 U.S.C.A. §§ 1396a(a) (13) (c) (ii) and 1396d(a) (4) (A). For the purposes of Title XVI, intermediate care facilities are defined so as to include only those facilities not providing the degree of care required of skilled nursing homes under Title XIX. See 42 U.S.C.A. § 1320a(e).

A state may participate and receive funds under these programs by submitting to the Secretary of Health, Education and Welfare a plan meeting requirements of federal law and regulations. As stated earlier, under Kansas law, K.S.A. Chap. 39, Art. 7, the appellant Kansas State Board of Social Welfare is charged with the duty of providing care and assistance under the federal Social Security Act and of determining state policies and supervising and administering the plans, which have been filed for participation in Title XVI and Title XIX programs. See K.S.A. 39-708. Under these plans the Kansas Board of

Health, which is the licensing agency for Kansas nursing, personal care and boarding homes, K.S.A. 39-923, has been designated as the state authority responsible for establishing and maintaining standards for institutions in which recipients may receive care or services, as required by 42 U.S.C.A. §§ 1396a(a) (9) and 1382(a) (9).

Plaintiffs' class of nursing homes provides nursing care under licenses issued by the Kansas Board of Health. Those licensed as "nursing homes" provide "skilled nursing home care" and those licensed as "personal care homes" provide "simple nursing care." As defined by the Board of Health, the skilled nursing homes are required to provide a level of medical care and health services commonly performed by or under the immediate supervision of a licensed registered nurse. The personal care homes are required to provide the "selected acts in the care of the ill, aged or infirm requiring certain knowledge and specialized skills, but not requiring the substantial specialized skills, judgment and knowledge required in skilled nursing care." See K.S.A. 39-923.

The facts are not entirely clear, but it appears that sometime in the spring of 1970 an "Adult Care Homes Manual" with a program for centralized payment was issued at the Board's direction. The Director of Social Welfare ordered the County Boards to put the manual into effect as of July 1, 1970, with some of the program covered thereby to become effective July 1, 1971. The manual provided that adult care homes, including the plaintiffs' class, were to be compensated by an allowable cost plus fixed fee formula for services provided to qualified recipients under the pro-

grams. Previously these services had been paid for on a negotiated basis by the 105 County Welfare Boards.

After this suit was filed in the state court a preliminary injunction was issued there "against the manual." Subsequently on August 5, 1970, the State Department of Social Welfare issued an amended regulation 30-5-27, set out in the margin.[7] This regulation contains the cost plus formula that is the primary issue in this case. The formula provided that the fees were to be paid on the basis of cost plus a reasonable profit, subject to budgetary limitations. On January 1, 1971, the regulation became permanent,

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7. "K.A.R. 30-5-27 FEES FOR [NURSING HOME] ADULT CARE HOME SERVICES. The fee for payment for levels of care [~~of medical assistance recipients in skilled nursing homes and in establishments with registered nurses and licensed practical nurses on the staff shall not exceed the rate paid by the county welfare department for similar care and services provided to recipients of the other categories of assistance.~~] in adult care homes shall be based upon the home's cost determined by data submitted by the home as required by the department plus a reasonable profit and subject to the department's budgetary limitations so that such fee for skilled nursing home services for patients qualifying for Title XIX benefits shall be the reasonable usual and customary charges for such home as determined by the above method. For adult care homes other than those qualifying as skilled nursing homes under the Title XIX program, the above method may be waived for the year July 1, 1970 to the year July 1, 1971, during which time the fees will be determined by the County Board of Social Welfare with the approval of the State Board." [Deletions in brackets—additions underscored.]

with minor changes and deletion of the provision on budgetary limitations.[8]

The trial court found, as is in effect conceded by defendants, that there was no regulation before August 5, 1970, by the Kansas Department of Social Welfare authorizing the provisions of the manual. And more importantly for our purposes, the trial court found that the regulation, K.A.R. 30-5-27 as adopted in 1968 and as subsequently amended, and the manual, were inconsistent with K.S.A. 39-708(x) until amendment of the statute on July 1, 1971, when the terms "usual and customary" were dropped from the statutory standard of "reasonable, usual and customary."[9]

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8. "K.A.R. 30-5-27 FEES FOR ADULT CARE HOME SERVICES. The fee for payment for levels of care in adult care homes shall be based upon the home's cost plus a reasonable profit which fee shall be determined by cost and other data submitted by the home as required by the department so that such fee for skilled nursing home services for patients qualifying for Title XIX benefits shall be the reasonable, usual and customary charges for such home as determined by the above method. For adult care homes other than those qualifying as skilled nursing homes under the Title XIX Program, the above method may be waived until July 1, 1971 during which time the fees will be determined by the County Board of Social Welfare with the approval of the State Board."

9. Prior to the July 1, 1971, amendment, the statute allowed payment for certain qualifying providers of services under the federal Social Security Act for "reasonable, usual and customary charges." The July 1, 1971, statutory amendment dropped the words "usual and customary."
As amended effective July 1, 1971, K.S.A. 39-708(x) reads as follows:

"(x) The state board shall take such action as may be

(Footnote 9 continued next page)

* [page 17 of original opinion]

* Among other things the state defendants argue that the Board must take availability of funds into account and adopt payment methods considering such circumstances which the Board's formula did. And they say that the Board's method of payment was a proper administrative action under the statutory standard of "reasonable, usual and customary" charges, which was directory and not mandatory or to be followed literally.

* [page 18 of original opinion]

* In view of the statutory provisions and Kansas decisions we agree with the trial court's holding that the cost plus formula was repugnant to the Kansas Statutes. Subsequent to the trial court's decision the Kansas Supreme Court decided *Rhodes v. Harder*, 508 P.2d 959, also involving K.S.A. 39-708(x). There another regulation, K.A.R. 30-5-29, dealing with payments for medical and professional services was challenged. Asserting that he was authorized to do so by the regulation, the Director of Social Welfare imposed

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9. [Cont.]

necessary to assure that persons, firms and corporations selling property or providing services and licensed practitioners, within the scope of their practice as defined by state law who provide professional services under the provisions of the Federal Social Security Act shall be paid [~~their~~] reasonable [~~usual and customary~~] charges. Payment for other medical assistance under the provisions of the federal social security act shall be [~~the~~] reasonable [~~usual and customary~~] charges: Provided, however, that if such payments are otherwise limited by federal law, such payments shall be as near the reasonable [~~usual and customary~~] charges as may be permitted by federal law."

We note that in 1972 the statute was again amended to reinsert the terms "usual and customary." See K.S.A. 1972 Supp. 39-708b(x).

a 25% discount on the regular charges for certain providers of medical services.

The Court held that the regulation and the administrative action attempting the discount were beyond the authority of K.A.R. 39-708(x) requiring that fees for medical and professional services be the reasonable, usual and customary charges. While payment for a different category of services was involved in the *Rhodes* case, the issue there under the statutory provision on "reasonable, usual and customary" * [page 19 of original opinion] charges parallels the issue involved in this case. * We therefore agree with the views of the district court. While there are some differences in the issue before us, we agree with the views of the resident District Judge on the unsettled law of his state which are persuasive and ordinarily accepted. *Sade v. Northern Natural Gas Co.*, 483 F.2d 230, 234 (10th Cir.).

For these reasons we affirm the declaratory judgment which determined that the manual and the regulation were inconsistent with K.S.A. 39-708(x) from its enactment until its amendment effective July 1, 1971.[10]

(3) The trial court's finding of a contract and the governmental immunity provisions of K.S.A. 46-901.

The state defendants challenge the trial court's finding that a unilateral contract existed between the State Board and the plaintiffs. They argue that K.S.A. 39-708(k), which provides for the making of contracts in the name of the Board, contemplates a

10. No issue is before us concerning the manual or regulation for the period subsequent to July 1, 1971.

written document, which was not found to exist in this case; that without such a written contract suit may not be maintained against the Board in view of K.S.A. 39-708(k); that K.S.A. 39-708(x) cannot support a finding of a contract because it is a legislative act and therefore not a contract of the Board; that the Board cannot be a party to an implied contract because it has retained no funds of a county, state or federal source under Title XIX or Title XVI other than up to one dollar per patient-day for Title XIX skilled nursing homes; that any claim against the Board based on an implied contract was required to be presented to the Joint Claims and Accounts Committee of the State Legislature by K.S.A. 46-901, et seq., which was not done; and that there can be no impairment of a contract right, since none exists.

We feel that the trial court did not err in finding the existence of a unilateral contract. The terms and conditions for performance of services required of the plaintiffs were set forth by the state plans filed with the Secretary of Health, Education and Welfare. Payment pursuant to the statutory standard of reasonable, usual and customary charges became part of the arrangement. See *Securities Acceptance Corp. v. Perkins*, 318 P.2d 1058, 1061 (Kan.). And such a contract may be made binding and mutual by the performance contemplated, and the receipt of promised benefits. *Commercial Asphalt, Inc. v. Smith*, 409 P.2d 796 (Kan.).

The trial court's opinion did not discuss K.S.A. 46-901, the governmental immunity statute. 46-901 does declare that state boards, commissions and the like are immune from liability and suit on an implied

contract, among other things. And the trial court's opinion did state that there was an implied contract between the state and the plaintiffs. However, this statement was not made with a view to K.S.A. 46-901, and we feel it improper to infer any such effect. In view of the plan, the statutory measure of payments and the requirements for licenses granted by the State Board of Health, we feel there was an understanding as to the essential terms. In such circumstances an express contract existed. See *In re Rogers' Estate*, 334 P.2d 830 (Kan.). *Stark County v. State*, 160 N.W. 2d 101 (N. D.), relied on by defendants, is not persuasive since the circumstances recited above support the finding of a unilateral contract in our case.

We agree with the trial court's view that there was a unilateral contract and accept the finding of such a contract under Kansas law.

(4) The validity of the manual under the procedural requirements for notice, hearing and the like prescribed by K.S.A. 77-416 and 77-421 for rules and regulations.

The trial court found that the manual, "which contains rules, regulations, standards and statements of policy and general orders applicable to all adult care homes of every classification in the State affects private rights and interests and is directed to a group which does constitute a general class and must therefor be filed in accordance with K.S.A. 77-416 with notice required by K.S.A. 77-421." There was no compliance with the procedural requirements and the sole question is whether the manual came within the procedural requirements of the statutes.

K.S.A. 77-415(4) defines "Rule or regulation" and enumerates certain exemptions from the definition and requires that ". . . every statement of general policy and every interpretation of a statute specifically adopted by an agency to govern its enforcement or administration of legislation shall be adopted by the agency and filed as a regulation as provided by" the act.

The language of K.S.A. 77-415(4) logically applies to the manual as a rule or regulation governing enforcement and administration of legislation. Moreover the exemptions in K.S.A. 77-415(4) (inter alia, purchases of materials, equipment or supplies by state agencies, and rates, prices, charges and the like for common carriers) contemplate that provisions like those in the manual come within the statute unless specifically exempted therefrom.

We are persuaded that the trial court's holding that the manual came within the provisions of the statutes was correct.

(5) The trial court's ruling that the plaintiffs' class provides medical assistance within the meaning of K.S.A. 39-702 and 39-708(x).

Finally the defendants challenge the trial court's determination that the plaintiffs' class provides medical assistance within the meaning of K.S.A. 39-702 and K.S.A. 39-708(x).[11] The determination was made

11. 39-702 provides that medical assistance shall mean medical, remedial, preventive or rehabilitative care and services furnished by licensed practitioners.

39-708(x) covers licensed practitioners providing professional services and also makes provision for payment for other medical assistance under the provisions of the federal Social Security Act.

in the declaratory judgment as well as in findings of fact 2 and 7, all of which are attacked. Specifically the defendants argue that only those nursing homes coming within the definition of a "skilled nursing home" under Title XIX provide medical assistance within the meaning of the Kansas Statutes, and that other facilities do not afford such services or come within the provisions of K.S.A. 39-708(x) on payment for medical assistance.

We must agree again with the trial court's determination as reasonable under the Kansas Statutes and regulations. First we note that the manual itself recognizes that under the existing licensing system personal care homes, which provide the lowest standard of care in plaintiffs' class, are qualified to offer intermediate care #2 under the manual which includes care for persons with relatively minor chronic incapacity or infirmity. Such intermediate care #2 also includes care for minor and usual ills, and occasional periods of illness. See Manual, p. 12. Moreover K.S.A. 39-923 defines "simple nursing care" provided by a "personal care home" as including acts in the care of the ill, injured or infirm requiring certain knowledge and specialized skills, but not requiring the substantial specialized skills, judgment and knowledge required in skilled nursing care. And similar standards are recognized in the definition of a "personal care home" in the rules and regulations of the Kansas State Board of Health. See K.A.R. 28-38-1.01.

Viewing the record as a whole we are satisfied that the determination of the trial court concerning the plaintiffs' class was a reasonable and proper

interpretation of the Kansas Statutes and regulations.

For these reasons we agree with the challenged rulings of the trial court. The declaratory judgment is, therefore, affirmed and the cause is remanded for disposition of the reserved claims for damages as provided in the order of the trial court.

JANUARY TERM — February 22, 1974

No. 72-1242

Before

HONORABLE OLIVER SETH,
HONORABLE WILLIAM J. HOLLOWAY, JR., and
HONORABLE WILLIAM E. DOYLE, *Circuit Judges*

SENECA NURSING HOME, WOODLAWN NURSING HOME, INC., KENWOOD VIEW NURSING HOME, HALSTEAD NURSING CENTER, INC., NORTHEAST NURSING CENTER, INC., NORTH CENTRAL NURSING CENTER, TOPEKA CONVALESCENT CENTER, EVENTIDE CONVALESCENT CENTER, INC., IVY MANOR NURSING HOME, INC., STAFFORD HOMES, GREEN MEADOWS NURSING CENTER, INC., TERRACE GARDENS SKILLED NURSING CENTER, CEDAR HOUSE, INC., *et al*,
Plaintiffs-Appellees,

v.

THE KANSAS STATE BOARD OF SOCIAL WELFARE, ROBERT C. HARDER, State Director of Social Welfare, WILLIAM C. GRAHAM, Chairman of the State Board of Social Welfare, *et al*,
ELLIOT L. RICHARDSON, Secretary of HEW,
Defendants-Appellants.

This matter comes on for reconsideration of the opinion of the Court filed January 18, 1974, in the captioned cause.

Upon consideration whereof, the Court orders cor-

rected pages 17 and 18, attached hereto, to be substituted for the original pages 17 and 18 heretofore distributed by the Court.

It is the further order of the Court that the opinion is modified by substituting these corrected pages to those parties and persons receiving the original opinion. It is ordered that the modification of the opinion does not require any change in the judgment entered January 18, 1974.

/s/ HOWARD K. PHILLIPS, Clerk

Filed February 27, 1974.

Among other things the state defendants argue that the Board must take availability of funds into account and adopt payment methods considering such circumstances which the Board's formula did. And they say that the Board's method of payment was a proper administrative action under the statutory standard of "reasonable, usual and customary" charges, which was directory and not mandatory or to be followed literally.

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9. [Cont.]
As amended effective July 1, 1971, K.S.A. 89-708(x) reads as follows:

"(x) The state board shall take such action as may be necessary to assure that persons, firms and corporations selling property or providing services and licensed practitioners, within the scope of their practice as defined by state law who provide professional services under the provisions of the Federal Social Security Act shall be paid [~~their~~] reasonable [~~usual and customary~~] charges. Payment for other medical assistance under the provisions of the federal social security act shall be [the] reasonable [~~usual and customary~~] charges:

(Footnote 9 continued next page)

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IN THE

Supreme Court of the United States

October Term, 1974

No. A-1126

73-1936

THE SECRETARY OF SOCIAL AND REHABILITATION SERVICES OF KANSAS,
Petitioner,

v.

SENECA NURSING HOME, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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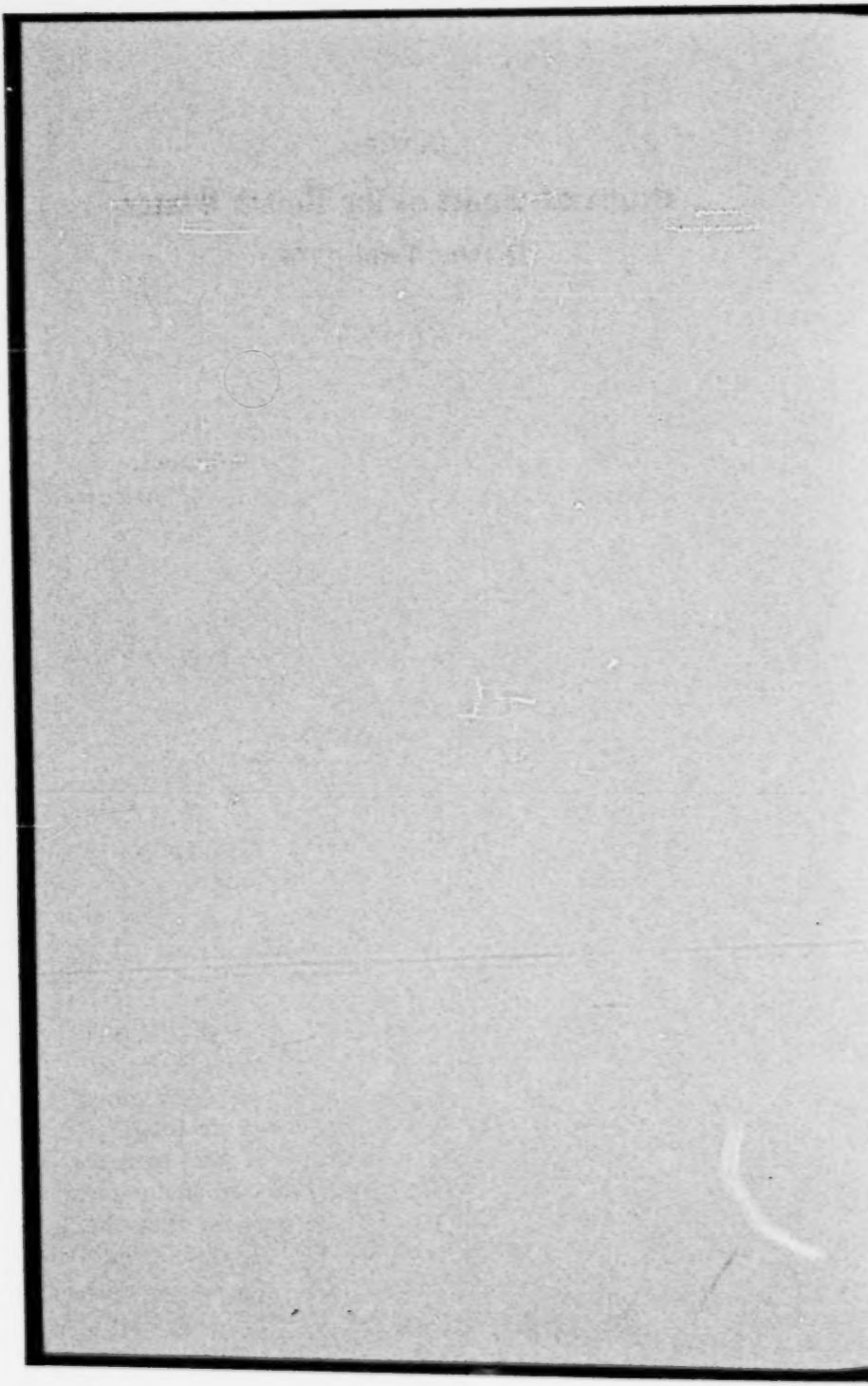

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BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

This action originated in the state court in the District Court of Shawnee County, Kansas, in which the Plaintiffs, the Respondents herein, sought an injunction, declaratory judgment and money damages against the State Board of Social Welfare to obtain full payment for the medical assistance in the form of institutional adult care home service which they provide for the Petitioner so that the Petitioner may fulfill its obligation under the state-federal

cooperative program to provide such care to the chronically ill and infirm aged who are medically indigent. The care provided by Respondents is long term.

Jurisdiction for such an action was granted by the State of Kansas in the Session Laws of 1967, Chapter 245, Section 2, in which sub-section (k) authorized contract actions against the Petitioner and in which sub-section (x) required that payment for such medical assistance "shall be the reasonable usual and customary charges . . . ." (Petitioner in its Petition For A Writ of Certiorari on page 8 erroneously quotes sub-section (x); that quotation is from Session Laws of 1971, Chapter 153, Section 1 which amended the sub-section (x) after this action was filed.) [1]

The issues were joined over the validity of an adult care home manual in which the Petitioner attempted to fix the allowable charges which Respondents could make for the long term care of the medically indigent which they provide to the State of Kansas. The Respondents are licensed and regulated by the Kansas State Board of Health, a separate state agency from the Petitioner, and the regulations of that

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[1] Prior to the 1971 amendment, the applicable provision of the statute read as follows:

> "(x) The state board shall take such action as may be necessary to assure that licensed practitioners within the scope of their practice as defined by state law who provide professional services under the provisions of the federal social security act shall be paid their reasonable usual and customary charges. Payment for other medical assistance under the provisions of the federal social security act shall be the reasonable usual and customary charges: *Provided, however,* That if such payments are otherwise limited by federal law, such payments shall be as near the reasonable usual and customary charges as may be permitted by federal law."

agency make no distinction between the medically indigent and non-indigent. Both classes receive care in homes of the Respondents without distinction.

The Respondents complained that the Petitioner refused to make the payments required by the statute and charged that the Petitioner had no authority to fix charges at less than the "reasonable usual and customary charges" established by state statute.

Interlocutory relief was granted by the state court against the Petitioner temporarily enjoining it from implementing the manual, requiring Petitioner to continue making current payments and to apply such payments to such specific charges to be paid by the Petitioner as the Court would finally determine in the action were required by the statute.

After the interlocutory order was issued, the Petitioner removed the action to the United States District Court alleging that the action involved determination of federal questions arising under the Federal Social Security Act and that the amount in controversy exceeded $10,000. After removal the Petitioner filed its answer denying the existence of a contract between Petitioner and Respondents and generally denying all other allegations of the Petition.

Later an amended answer was filed by the Petitioner stating that it is operating a Medical Assistance Plan approved by the Secretary of Health, Education, and Welfare pursuant to Section 1901 of Title XIX of the Social Security Act as amended (42 U.S.C. 1396a); that this plan required the Petitioner to follow and apply all rules and regulations of the Department of Health, Education, and Welfare and that the said plan rules are necessarily put in question by the Petition filed by the Respondents; that the regulations of the Department of Health, Education, and Welfare are contained in Title 45 of the Code of Federal Regulations

and in various publications and directions of that Department; and that the plan is also based upon the Kansas Administrative Regulations contained in Sections 30-1-1 *et seq.*

After initial discovery an amended and supplemental complaint was filed by the Respondents joining the Secretary of Health, Education, and Welfare as a necessary additional party defendant to adjudicate all federal and state issues relating to payment. Answers were filed by all parties and issues joined. The United States District Court found jurisdiction as stated in the Petitioner's Statement of the Case.

The claim by the Petitioner that no contract existed with Respondents was resolved against the Petitioner by the trial court and the United States Court of Appeals for the Tenth Circuit. The terms of the contract were specified by the appellate court to be contained in the state plan under which federal funds were obtained, the statutory measure of payments, and the requirements for licensure of Respondents by the Kansas State Board of Health.

ARGUMENT

I

The first reason advanced by Petitioner for granting the writ is that the Court of Appeals improperly assumed pendent jurisdiction to make factual findings which conflict with the findings of the trial court.

The opinion of the Court of Appeals carefully reviewed and approved the District Court's assumption of pendent jurisdiction, first finding that at least two of the Federal claims "could not be dismissed as obviously without merit and defective as a jurisdictional base." *Seneca Nursing Home v. Kansas State Board of Social Welfare*, 490 F.2d

1324, 1328 (10th Cir. 1974). The Tenth Circuit then observed: "When the declaratory judgment was entered on state grounds the federal claims had not been dismissed or abandoned. In these circumstances and in view of the complexity of the intertwined federal issues, the exercise of pendent jurisdiction was within the reasonable discretion of the trial court." *Id.* at 1329. The brief of the Petitioner fails to advance any adequate basis for granting certiorari for the first asserted reason and the opinion of the Court of Appeals where relevant thereto is clearly correct.

The Petitioner implies that the Court of Appeals contradicted the District Court in finding that an express contract existed between Petitioner and Respondents on which Petitioner could be sued. To support the contention Petitioner cites one sentence in the District Court's lengthy and exhaustive Findings of Fact and Conclusions of Law which makes reference to an implied contract existing between "the state through its welfare board, and the plaintiff providers . . . ." However, as the opinion below recognizes, "this statement was not made with a view to K.S.A. 46-901 [pertaining to the immunity of the State], and we feel it improper to infer any such effect." *Id.* at 1332. The Petitioner is attempting to establish a conflict where none exists between views of the District Court and the Court of Appeals on the contractual relationship between Petitioner and Respondents. Those views are in harmonious agreement that a contract between the parties existed on which the state could be sued to recover damages.

The interpretation by the resident District Judge, affirmed by the Tenth Circuit, of the law of the State of Kansas with respect to Respondents' claims finds strong support in the decision by the Kansas Supreme Court in *Rhodes v. Harder,* 211 Kan. 820, 508 P.2d 959, *modified,* 212 Kan. 500, 512 P.2d 354 (1973), rendered subsequent to the trial court's decision herein. In *Rhodes* an effort by the

Kansas Director of Social Welfare and the Petitioner herein to reimburse physicians, another class of providers of medical services, at less than "reasonable usual and customary" charges was successfully challenged as contrary to the mandate of K.S.A. 39-708(x), the same statute at issue here.

II

The second asserted reason for granting certiorari suggests both the District Court and the Tenth Circuit erred in not including "all state constitutional and statutory provisions" as part of the contractual relationship found to exist between Petitioner and Respondents. Reference is then made to the governmental immunity statute, K.S.A. 46-901, and a provision in the Kansas Constitution concerning appropriations from the state treasury.

The immunity statute issue is an integral element of the first asserted reason for granting certiorari discussed in the preceding part of this brief. The Tenth Circuit addressed the issue and rejected the Petitioner's argument, 490 F.2d at 1332-33, a result supported by the Kansas Supreme Court in *Rhodes v. Harder, supra.*

We fail to comprehend the relevancy of the constitutional provision regarding appropriations from the state treasury. Similar provisions appear in most state constitutions with inconsequential if any effect on the immunity of a state from litigation.

III

The third asserted reason for granting certiorari challenges the comment in the Tenth Circuit opinion that respondents "have standing to assert the claims of indigent welfare recipients . . . ." The reference is to the statement in the

opinion: "And the plaintiffs as recipients of payments would have standing for *themselves* and for the interest of those served by them to assert these claims in view of the relationship to the indigents cared for." (490 F.2d at 1328-29, emphasis added.) Although Respondents agree with the court below that they had standing to represent the interests of their indigent patients, that conclusion need not be defended here since it is superfluous to the clearly correct finding that the Respondents *themselves* had standing to pursue the action.

The Eleventh Amendment

Since the decision in the Tenth Circuit the Supreme Court has decided *Edelman v. Jordan,* 415 U.S. 651 (1974). That decision held that the Eleventh Amendment prevented an award of retroactive damages against a state by a Federal court in an action by welfare recipients. Obviously *Edelman* impacts on the power of the District Court in this case to enter an award for damages in favor of Respondents against the State of Kansas on the reserved claims. Under the District Court order, affirmed by the Court of Appeals, Respondents "are entitled to recover the reasonable, usual and customary charges for medical assistance which they have provided under the provisions of K.S.A. 1970 Supp. 39-708(x) from the date it was originally enacted to July 1, 1971, from defendant, the Kansas State Board of Social Welfare, reduced by payments heretofore received." [2] Respondents submit, however, that the action of the State of Kansas in voluntarily removing the suit from the state court where it was commenced, to the United States District Court, operated to waive the state's immunity under the Eleventh Amendment. The issue was first raised in the petition for writ of certiorari.

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[2]Conclusion of Law, No. 22, Pet. Brief, p. 88.

The removal was allowed in this case pursuant to 28 U.S.C. § 1441(b), which requires that the federal district court have original jurisdiction of the matter. Original jurisdiction was claimed by petitioner under 28 U.S.C. § 1331(a), by asserting the existence of a federal question involving Title XIX of the Social Security Act and the regulations propounded thereunder by the Department of Health, Education, and Welfare and that the matter in controversy exceeded the sum or value of $10,000, exclusive of interest and costs. The clear and overwhelming implication of Petitioner asserting the existence of original jurisdiction under 28 U.S.C. §1331(a) is that Petitioner had waived immunity under the Eleventh Amendment. The amount in controversy requirement, as a jurisdictional requirement, may not be waived. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 547 (1972).

As the amount in controversy requirement may not be waived, the Petitioner in removing and claiming federal question jurisdiction clearly was asserting that the value of the suit's intended benefit to the plaintiff was at least $10,000. In sum, the Petitioner, by acknowledging that the federal court had the power to confer at least a $10,000 benefit on plaintiffs, clearly waived whatever protection it had under the Eleventh Amendment and acknowledged the court's jurisdiction.

In *Great Northern Life Insurance Co. v. Read*, 322 U.S. 47, 54 (1945), quoted with approval in *Edelman*, it was stated:

> "[W]hen we are dealing with the sovereign exemption from judicial interference in the vital field of financial administration a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found."

Petitioner's removal of this case to the federal court system is the clearest possible "declaration of the State's intention to submit its fiscal problems to other courts." It is difficult to perceive what would constitute greater evidence of such intention.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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